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February 25, 1997

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

Re: Proposed Amendments to Oregon Rules of Civil Procedure

Dear Mr. Holland:

I am writing regarding the proposed change to ORCP 55. I am concerned that 15 days' notice would be excessive. I agree that 24 hours' notice is not sufficient, but I feel 15 days' notice would unnecessarily delay discovery. I would propose the notice requirement be seven days, in conformity with ORCP 55D(1).

Thank you for your consideration.

Very truly yours,

R.G. Stephenson

RGS:ej

Attachment B-2 to Agenda
of 1-10-98 Council
Meeting

COUNCIL ON COURT PROCEDURES

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March 13, 1997

Ronald G. Stephenson
Bullivant Houser Bailey Pendergrass & Hoffman
Attorneys at Law
300 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089

Dear Mr. Stephenson: Re: ORCP 55 I

Many thanks for your February 25 letter commenting on the Council's amendment of ORCP 55 I which would change from 24 hours to 15 days the advance notice period before medical records subpoenas may be served. Along with other comments to the same effect, I shall distribute your letter as an attachment to the agenda of the next Council meeting. Unfortunately, the Council does not meet while the legislature is in session. Thus, the next meeting, the first one of the 1997-99 biennium, will not be until early October.

The Council very much appreciates your input.

Sincerely yours,

Maurice J. Holland
Executive Director

CIRCUIT COURT OF THE STATE OF OREGON
FOURTH JUDICIAL DISTRICT
ANNA J. BROWN
JUDGE
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
PORTLAND, OR 97204-1123
DEPARTMENT 07
PHONE (503)248-3348
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March 13, 1998

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: ANNA J. BROWN, Chair
ORCP 55 Subcommittee

RE: SUMMARY OF WORK TO DATE

This subcommittee is comprised of Lisa Brown, Kathryn Chase, Diana Craine, Bill Gaylord, Nancy Tauman and I.[1] Since our appointment at the Council's January meeting, we have met three times. We conclude that there are sufficient problems with ORCP 55 to merit Council consideration whether the rule should be revised in its entirety or whether, at least, ORCP 55H and I should be consolidated and amended to provide consistent procedural safeguards to protect against unauthorized disclosure of privileged records.

Attachments:

A. Text of Rule 55 (ORS 1997 Edition)

B. Schematic diagram of subsections H and I pertaining to 'hospital records" and "medical records"

C. Bill Gaylord's summary of subsections H and I

Discussion: Rule 55 is titled "Subpoena" and its subsections

- (A) define "subpoena"
- (B) specify a particular procedure for the subpoena "production of books, papers, documents, or tangible things and to permit inspection" with or

[1]Bruce Brothers withdrew from the subcommittee without having been able to participate in any meeting.

without appearance for deposition, hearing or trial

- (C) describe "issuance" of a subpoena
- (D) set "service" procedures generally, but a different service procedure for law enforcement subpoenas
- (E) provide limitations on subpoenas for an incarcerated witness
- (F) determine further procedures for subpoena production of documents, including production without appearance, unless the subpoena is to a hospital
- (G) authorize courts to punish as contempt a witness' disobedience to a subpoena or refusal to be sworn
- (H) and (I) outline yet two more procedures for subpoenas if they are for hospital records or medical records

As written, the rule is at least confusing, hard to apply, and internally imbalanced, requiring many procedural steps for the subpoena of some types of evidence, and almost no process for other types, specifying consequences for noncompliance in some subsections while describing obligations with no compliance criteria in others. Ideally, we think the entire rule should be reworked to provide one procedure that is generally applicable to all types of subpoenas with, where substantively required, additional steps peculiar to certain types of evidence. In any event, we recommend that at least subsections H and I be consolidated and that the Council consider adding a requirement for proof of service on a patient whose hospital or medical records are the subject of a litigant's subpoena inquiry.

To date our work has not advanced to proposed language changes. We hope for some guidance from the Council as to the preferred scope and direction of our efforts.

shall conduct the settlement conference. [CCP 12/2/78; amended by 1979 c.284 §32; §E amended by CCP 12/13/80; §A amended by 1981 c.912 §2; §E amended by 1983 c.531 §1; §A amended by CCP 12/8/84; amended by 1995 c.618 §1].

SUBPOENA
RULE 55

A Defined; form. A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B For production of books, papers, documents, or tangible things and to permit inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things but not commanded to also appear for deposition, hearing or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents or tangible things the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C Issuance.

C(1) **By whom issued.** A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce books, papers, documents or tangible things and to permit inspection thereof: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

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

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

D(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, 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 deposi-

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tion, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, whether the subpoena is served personally or by mail, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

D(2) **Service on law enforcement agency.**

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

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

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

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

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

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

D(4) **Service by mail; exception.** Service of subpoena by mail may be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

D(5) **Proof of service.** Proof of service of a subpoena is made in the same manner as proof of service of a summons except that the server need not certify that the server is not a party in the action, an attorney for a party in the action or an officer, director or employee of a party in the action.

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.

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

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

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

H Hospital records.

H(1) **Hospital.** As used in this rule, unless the context requires otherwise, "hospital" means a health care facility defined in ORS 442.015 (14)(a) through (d) and licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.695.

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

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena 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 responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph H(2)(b)(iv), then a copy of the subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the hospital.

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records

shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of section D(3) of this rule.

H(3) Affidavit of custodian of records.

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) Personal attendance of custodian of records may be required.

H(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

I Medical records.

I(1) **Service on patient or health care recipient required.** Except as provided in subsection (3) of this section, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is not valid unless proof of service of a copy of the subpoena on the patient or health care recipient, or upon the attorney for the patient or health care recipient, made in the same manner as proof of service of a summons, is attached to the subpoena served on the custodian or other keeper of medical records.

I(2) **Manner of service.** If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient at least 15 days before the subpoena is served on a custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 15-day period. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by Rule 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient at least 15 days before the subpoena is served on the custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 15-day period. Service on a patient or health care recipient under this section must be made in the manner specified by Rule 7 D(3)(a) for service on individuals.

I(3) **Affidavit of attorney.** If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is valid if the attorney for the person serving the subpoena attaches to the subpoena the affidavit of the attorney attesting to the following: (a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b)

That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and (c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

I(4) **Application.** The requirements of this section apply only to subpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550, a health care service contractor as defined in ORS 750.005, a home health agency licensed under ORS chapter 443 or a hospice program licensed, certified or accredited under ORS chapter 443. [CCP 12/2/78; §§A, C, H amended by 1979 c.284 §§33, 34, 35; §§D(1), F(2) amended by CCP 12/13/80; §D amended by CCP 12/4/82; §D amended by 1983 c.751 §5; §H(2) amended by CCP 12/13/86; H(2) amended by CCP 12/10/88 and 1/6/89; §E amended by 1989 c.980 §3; amended by CCP 12/15/90; §H amended by 1993 c.18 §3; §D amended by CCP 12/10/94 and 1995 c.79 §404; §§F, H amended by CCP 12/10/94; §I enacted by 1995 c.694 §1; §I amended by CCP 12/14/96; §D amended by 1997 c.249 §10]

TRIAL BY JURY

RULE 56

Trial by jury defined.

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

B **Six-person juries.** Notwithstanding section A of this rule, a jury in circuit court shall consist of six persons if the amount in controversy is less than $10,000. [CCP 12/2/78; amended by 1995 c.658 §119]

Note: For text of ORCP 56 operative until January 15, 1998, see ORCP 56 (1995 Edition). See notes preceding 1.001 for further explanation.

JURORS

RULE 57

A Challenging compliance with selection procedures.

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

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

A(3) **Exclusive means of challenge.** The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the applicable provisions of ORS chapter 10.

B Jury; how drawn. When the action is called for trial the clerk shall draw names at random from the names of jurors in attendance upon the court until the jury is completed or the names of jurors in attendance are exhausted. If the names of jurors in attendance become exhausted before the jury is complete, the sheriff, under the direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as may be necessary to complete the jury. Whenever the sheriff shall summon more than one person at a time from the bystanders or the body of the county, the sheriff shall return a list of the persons so summoned to the clerk. The clerk shall draw names at random from the list until the jury is completed.

C Examination of jurors. When the full number of jurors has been called, they shall be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court shall regulate the examination in such a way as to avoid unnecessary delay.

D Challenges.

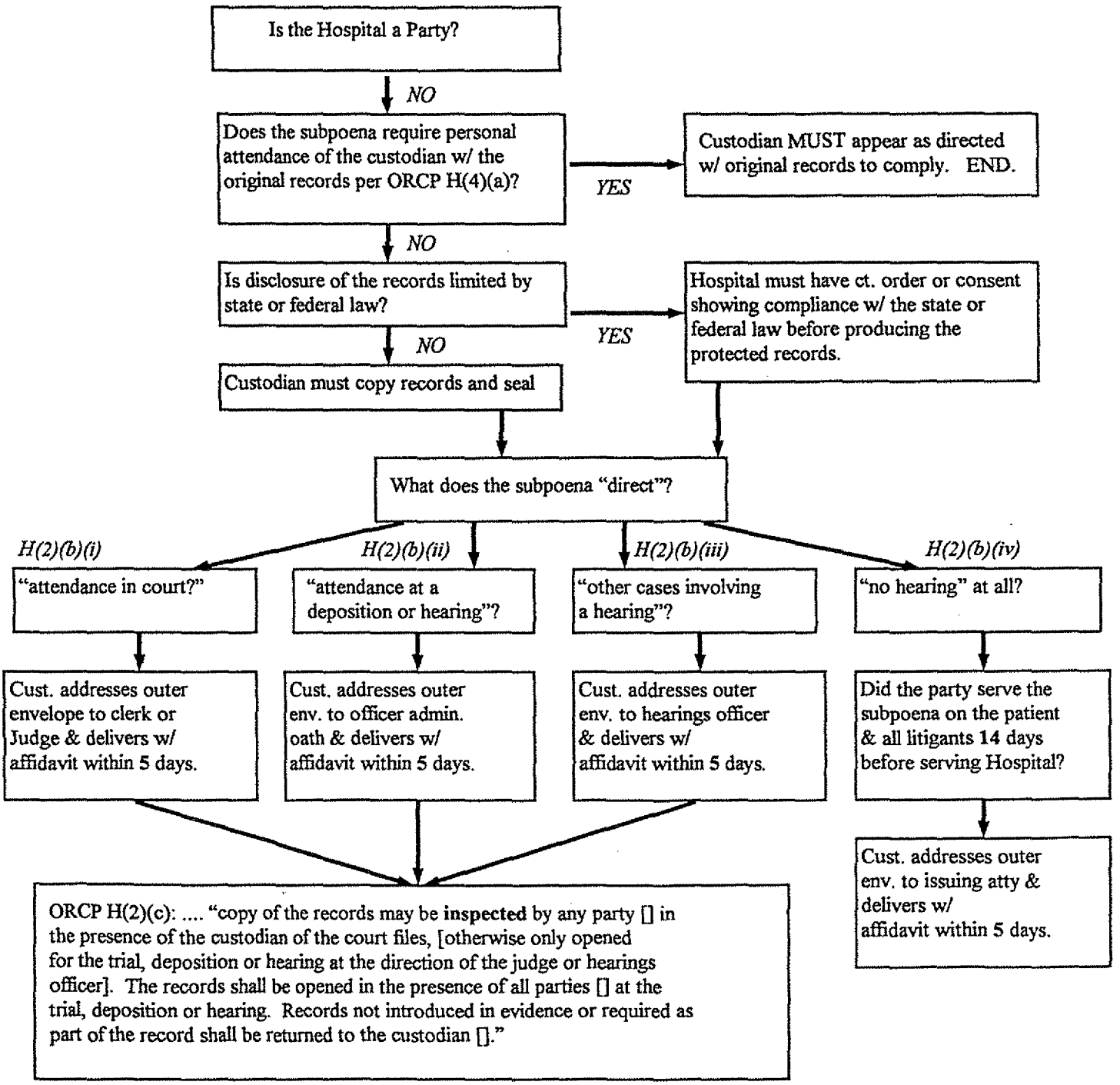
D(1) **Challenges for cause; grounds.** Challenges for cause may be taken on any one or more of the following grounds:

D(1)(a) The want of any qualifications prescribed by ORS 10.030 for a person eligible to act as a juror.

D(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

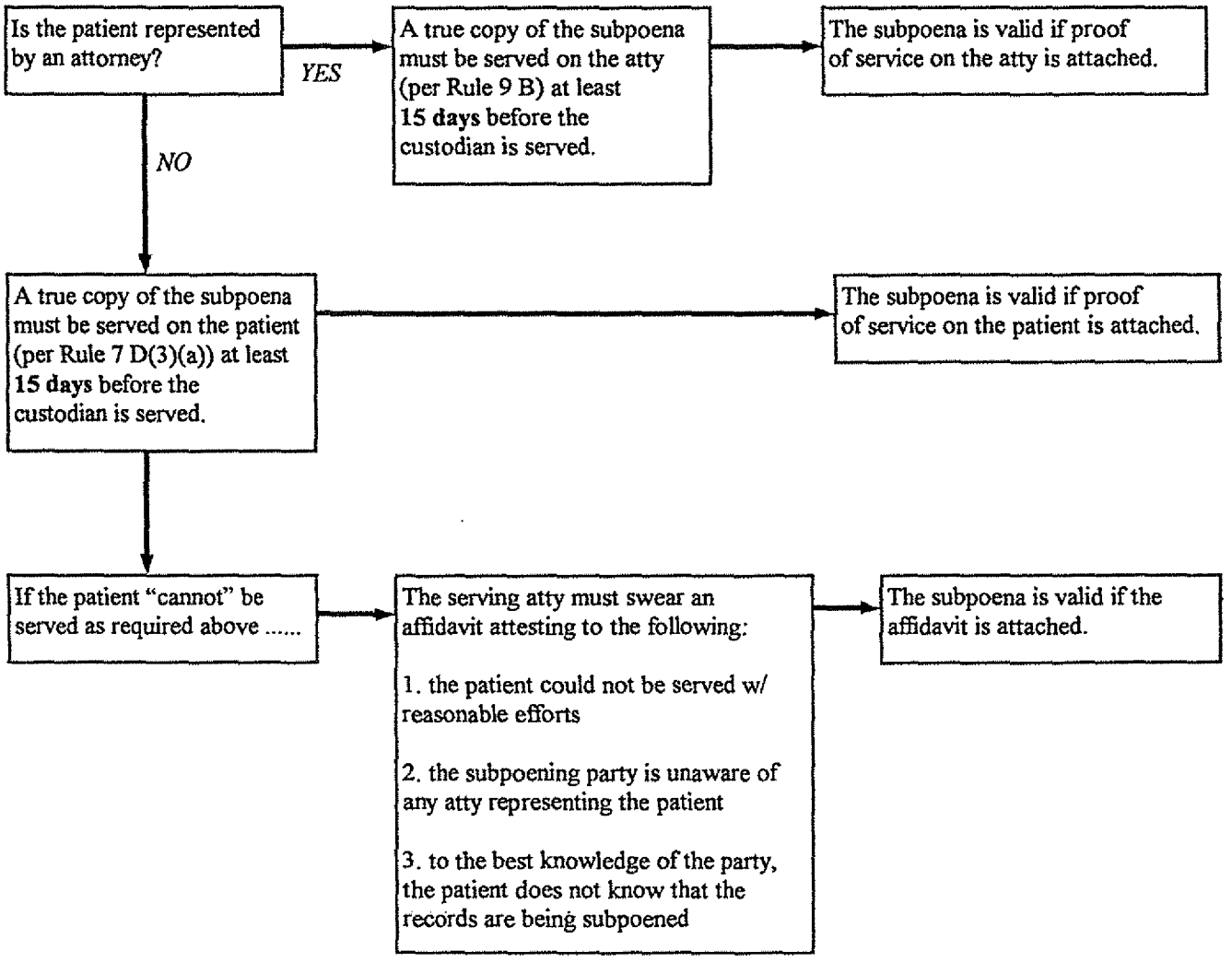
ORCP 55 H (also applies to criminal cases)

WHO does this apply to?
1. "hospital" and "special inpatient care facility" .....ORS 442.015(14)(a)
2. "long term care facility" including a "skilled nursing facility" or "intermediate care facility" .....ORS 442.015(14)(b)
3. "ambulatory surgical center".....ORS 442.015(14)(c)
4. **NOT** an "establishment furnishing primarily domiciliary care" .....ORS 442.015(14)(d), and **NOT** "Residential Facilities and Homes" per ORS 443.400 to 443.455 .....ORS 442.015(14)(b)
5. "Local Mental Health & Developmental Disability Services" .....ORS 430.610 to 430.695



ORCP 55 I

WHO does this apply to?
1. licensed, registered or certified health practitioner .....ORS 18.550
2. health care service contractor .....ORS 750.005
3. home health agency or hospice program .....ORS Chapter 443



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February 9, 1998

The Honorable Anna Brown
Circuit Court Judge
1021 SW Fourth Avenue
Portland, Oregon 97204

RE: ORCP 55 H and I subcommittee of Council on Courts Procedure

Dear Judge Brown:

I have just had time to dash off my own quick summary of what these two rules seem to say in present form, a copy of which I am enclosing. I am starting to have thoughts about where these could be improved, but do not have time (or gelatin) for them to gel right now. Unless skiing is hopeless this week, I will miss the meeting, but will try to catch up later.

Very truly yours,

GAYLORD & EYERMAN, P.C.

William A. Gaylord

WAG:jki

Enclosure

C-1

Outline of ORCP 55 H and I for COCP subcommittee

ORCP 55H:

1. If you want to get hospital records by subpoena (i.e. not if you have patient's consent), this rule is the only way. 55H(2).

2. If you want the subpoena to get you records that are protected by *state or federal law*, then you have to show compliance with such law by either a court order or an appropriate consent. ORCP 55H(2)

> [Note: is this circular or self-defeating, in that ALL medical records are protected at least by state law in that they are subject to the physician-patient privilege of ORE 504-1(2)?]

3. If some records are so protected, compliance with the subpoena is accomplished by producing only the non-protected (if any) records, unless the mentioned consent is shown. 55H(2)

4. If the court order or consent is served with the subpoena, then compliance requires production of all records requested (presumably limited by any limitations in the order or request). 55H(2)

5. When a non-party hospital is served a subpoena for all or part of the records of a patient's care at the hospital, compliance is had by mailing a true copy within 5 days with the affidavit described below. 55H(2)(a).

6. Then, details are given of how to package the copy of the records, seal them in an envelope, and how to address them, depending on whether subpoenaed to court, to a deposition, or other proceeding. 55H(2)(b). Note: one choice is to send to directly to the lawyer or party issuing the subpoena.

7. Strict requirements are set to the effect that the package is not to be opened except in the presence of the court file custodian, or only at the time of the trial, deposition, or other proceeding, in the presence of all parties. This begs the question of controls over opening them when sent directly to the issuing lawyer or party. 55H(2)(c).

8. Hospital records subpoena's may be served by first class mail, and not subject to the general subpoena by mail section of 55D(3). 55H(2)(d).

> Note: I think two years ago in re-working ORCP 7 we changed references to "first class mail" after learning that it did not have the significance at the post office we thought it did. Dave Brewer can fill in the gaps in my memory about this.

9. The typical requirements of the business records exception to hearsay are supplied by an affidavit of the custodian of the records, required by 55H(2)(a) above, and described in detail at 55H(3)(a).

10. The rule provides a form statement to include in the subpoena if you really want the custodian to attend the deposition, trial, etc. and testify for some reason. 55H(4)(a). The custodian becomes the "witness of the party" who first serves them such a subpoena, of more than one does.

11. By inference, the records subpoena is to be accompanied by a witness and mileage fee, though all the rule says is that nothing requires more than one such fee. 55H(5).

ORCP 55I:

1. Service on keeper of med records is no good unless attached to proof of service of a copy of the subpoena on the lawyer for the patient, unless instead attached is an affidavit of the serving attorney saying what section (3) requires. ORCP 55I(1).

2. If the patient has a lawyer, the subpoena must be served on that lawyer at least __ hours (my 1997 West's Rules says 24 hours, but I think this is where the 1997 legislature changed it to 15 days) before service on the records keeper. Service on the attorney is per ORCP 9B. If the patient has no lawyer, the copy must be served on the patient __ hours (same issue) before serivec on the records keeper. Then service is per ORCP 7D(3)(a). ORCP 55I(2).

3. The affadavit of the serving lawyer under 1 above must say that the patient can't be served after reasonable efforts, AND has no known lawyer, AND to the best of the subpoenaing party, doesn't know about the subpoena. 55I(3).

4. This rule only applies to records of certain listed types of licensed or certified health care providers. 55I(4).

October 17, 1997

To: Chair & Members, Council on Court Procedures

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

Re: Suggestion from Karen Allen

During a phone conversation I had with Karen Allan, of Medford, she mentioned that, while working on a case recently, she had to spend an inordinate amount of time puzzling over the relationship between ORCP 55 H(2)(b)(iv) and H(2)(c) before concluding that the Council could not have intended there to be any relationship, since these two provision simply do not jibe. H(2)(d)(iv) deals hospital records subpoenaed to be delivered to a party or attorney rather than to a clerk [H(2)(b)(i)] or to an officer conducting a deposition [H(2)(b)(ii)] or a hearing [H(2)(b)(iii)].

55 H(2)(c) prescribes how custody of subpoenaed hospital records is maintained pending the trial, hearing, or deposition, the conditions under which access to the records is afforded for inspection, but presumably not for copying, etc. [Query, does it make any sense to permit inspection, but not copying?] The procedures prescribed in H(2)(c) would seem to have absolutely no applicability to records subpoeaned for return to attorneys' offices. At least that was the conclusion Ms. Allan reached.

I don't see any doubt but that she is right. If the Council agrees, a fix should be fairly simple. Perhaps all it would take is some language making clear that H(2)(c) applies only to records subpoenaed pursuant to H(2)(b)(i), (ii), or (iii).

Immured as I am in my ivory tower, I'm not in a postion to know, but nonetheless wonder whether the folderol prescribed by H(2)(c) is ever necessary or useful. Perhaps there are other rules that I'm not aware of, or privacy considerations respecting some hospital records, but I question why a lawyer would ever subpoena records for return for sealing by an official custodian, when he or she could just subpoena them for return to his or her office. The Council will surely know whether this point has any validity and, if so, might warrant some more wide-ranging surgery on 55 H.

Attachment B-15 to Agenda
of 1-10-98 Council
Meeting

COOS COUNTY OFFICE OF LEGAL COUNSEL
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TDD Relay 1-800-735-2900 E-Mail: cooscc@mail.coos.or.us

DAVID R. RIS
County Counsel

DAVID A. CAMERON
Assistant County Counsel

September 30, 1997

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

Re: ORCP 55 (H) & (I)

Dear Mr. Holland:

I recently had the opportunity to speak with Gilma Henthorne regarding recent updates to ORCP 55(I). During our conversation, I expressed my frustration about the application of ORCP 55(H) and (I). I also mentioned that I would be issuing a memo to my clients, the County's Health and Mental Health Departments, regarding their response to subpoenas for medical records. Ms. Henthorne suggested that it may be helpful if I sent a copy of my memo to you.

As you will see from my memo, there is some confusion in the application of Rule 55, paragraphs H and I. Rule 55(H) applies, by its definition, to the County's Mental Health Department. However, Rule 55(H) clearly does not apply the to County's Health Department. Conversely, Rule 55(I) applies to the County's Health Department but clearly not to the County's Mental Health Department.

But this is only part of the fun. The Gonzalez case I cite in my memo of September 30, 1997, states that Oregon Rules of Civil Procedure do not apply to criminal matters unless there is a statute that specifically makes them apply. This was a 1993 case. The 1995 Legislature closed this loophole by passing ORS 136.447 which specifically applies Rule 55(H) to criminal matters.

Attachment B-3 to Agenda
of 1-10-98 Council
Meeting

However, the same Legislature passed Rule 55(I) but did not also apply it to criminal matters.

The upshot of this tirade is that the Health and Mental Health Departments must handle subpoenas for medical records both differently from each other and differently depending on whether the subpoena is based on a criminal or civil matter. I am sure you can see the confusion.

By sending you a copy of my memo to the Health and Mental Health Departments, I am hoping that the Council on Court Procedures can amend the Rules appropriately to make their application somewhat more uniform. Alternatively, if you can show me how and where I am mistaken, I would be pleased to listen.

Please feel free to contact me if I can be of any further assistance.

Sincerely yours,

David A. Cameron

Enclosures

Attachment B-4 to Agenda
of 1-10-98 Council
Meeting

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DAVID R. RIS
County Counsel

DAVID A. CAMERON
Assistant County Counsel

September 30, 1997

TO: Pat Orme
David Bertapelle
Ginger Swan

FROM: David Cameron DC

RE: Subpoenas for Medical Records - Revisited

Some questions have recently arisen regarding the proper response to a subpoena for a patient's medical records. This issue was addressed in a memo dated July 31, 1996 (a copy of which is attached for your convenience). However, since there is some confusion between the Oregon Rules of Civil Procedure (ORCP) and to which department and under what circumstances they would apply, I think it is necessary to clarify the response that the rules would require of the Health Department and the Mental Health Department.

It is important to note that the rules treat the Health Department and the Mental Health Department differently and different rules apply to each. It is also important to understand that there is a difference between "Civil" and "Criminal" matters, particularly as they apply to the Health Department. I will address how each department should respond to a subpoena in either a civil or criminal matter.

HEALTH vs. MENTAL HEALTH

MENTAL HEALTH DEPARTMENT: ORCP 55 deals with subpoenas. A portion of this rule deals with the procedure to obtain "Hospital Records" (ORCP 55(H)) and another portion sets forth the procedure people must follow to obtain "Medical Records" (ORCP 55(I)). Unfortunately, the rules do not define either type of record or the difference between them. However, they each define the types of facilities or individuals to which they apply. Again,

Attachment B-5 to Agenda of 1-10-98 Council Meeting

unfortunately, these definitions tend to add to the confusion rather than help us apply the rules in a uniform manner.

ORCP 55(H)(1) *[Hospital Records]* states:

> "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 430.695.

ORS 442.015(14)(a) through (d) defines various hospital facilities with inpatient care facilities. It is clear that neither the Health nor Mental Health Departments meet this definition. However, "community health programs established under ORS 430.610 through 430.695" defines a County Mental Health program. Therefore, it is my opinion that records subpoenaed from the Mental Health Department would be subpoenaed pursuant to ORCP 55(H) and would not be subject to the patient notification requirements of ORCP 55(I). The procedures for handling and packaging the records set forth in the July 31, 1996, memo would apply to these records.

HEALTH DEPARTMENT: The County Health Department records, on the other hand, do not come under the definition of "Hospital Records". ORCP 55(I)(4) indicates that the subpoena provisions for "Medical Records" apply to:

> [S]ubpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550 . . ..

Among the health practitioners listed in ORS 18.550 are physicians, nurses, and nurse practitioners. Because the Health Department patients are seen by physicians, nurses and/or nurse practitioners, these records are covered by ORCP 55 (I) - Medical Records. In contrast, patients at the Mental Health Department are seen by caseworkers who are "Qualified Mental Health Associates" or "Qualified Mental Health Professionals". They are not nurses, nurse practitioners or licensed clinical social workers.

THE DIFFERENCE: Patient records from the Mental Health Department would be classified as Hospital Records under Rule 55(H) while similar records from the Health Department would be classified as Medical Records under Rule 55(I).

CRIMINAL vs. CIVIL CASES

Another aspect of the confusion between Rule 55(H) for Hospital Records and Rule 55(I) for Medical Records is to determine when they apply. In 1993, the Oregon Court of Appeals[1] held that the subpoena provisions for Hospital Records contained in ORCP 55(H) did not apply in criminal matters. They reasoned that the rule was contained in the Rules for "Civil" Procedure and there are specific statutes that apply certain civil procedure rules to criminal cases. At that time there was no statute that applied Rule 55(H) to criminal matters.[2]

To address this, in 1995 the Oregon Legislature enacted ORS 136.447. This statute specifically applies ORCP 55(H) (Hospital Records) to criminal matters. It is somewhat odd that this same legislature passed ORCP 55(I) (Medical Records) but did not include it as applying to criminal matters. Why the Legislature applied the Rule on Hospital Records to criminal cases and did not also include the Rule on Medical Records is a mystery. However, under the reasoning and holding of the Gonzalez case, it is my opinion that the Medical Records provisions of ORCP 55(I) do not apply to a subpoena issued in a criminal matter.

SO, WHAT DO WE DO?

If the Mental Health Department receives a subpoena duces tecum (a subpoena for medical records) in either a criminal or civil matter, they should comply with the procedures and requirements for Hospital Records set forth in my memo of July 31, 1996.

---

[1] State v. Gonzalez, 120 Or.App. 249 (1993).

[2] Rule 55(E) and Rule 55(G) were specifically applied to criminal matters through ORS 136.600.

Alternatively, if the Health Department receives a subpoena duces tecum in a civil matter, the subpoena must contain the affidavit required by ORCP 55(I) showing that the patient or their attorney has been served with a copy of the subpoena at least 24 hours[3] before it was served on the Health Department. If the Health Department receives a subpoena in a criminal matter (this would probably be a subpoena from the District Attorney's Office or would have the letters "CR" as a part of the case number) you would handle it like a standard subpoena and deliver copies of the records to the party issuing the subpoena. No notice to the patient or their attorney would be required in a criminal case, although it would be perfectly acceptable if your department wanted to let the patient or their attorney know that you received such a subpoena. Anytime you have a question as to which type of case the subpoena represents, please call Counsel before responding to it.

I realize that trying to apply Hospital Records provisions to the Mental Health Department and Medical Records provisions to the Health Department can get complicated. And differentiating between criminal and civil cases makes the situation more confusing. However, I think the guidelines set forth above will help you figure out how to handle subpoenas for patient records. To further assist the departments, I have drafted the attached checklists for handling such subpoenas. Follow the steps on the checklist when you receive a subpoena for records and the majority of your questions should be answered.

Please feel free to contact me if you have any questions.

Attachments

c: Council on Court Procedures (w/att.)

---

[3]This 24 hour time limit will change to 15 days in January, 1998.

HEALTH DEPARTMENT
CHECKLIST FOR HANDLING
SUBPOENAS DUCES TECUM
ORCP 55(I)

1. Does the Health Department have any records concerning the person or persons mentioned in the subpoena?

___ Yes – Continue to Item #2.

___ No – Notify the person who issued the subpoena that you have no such records. See Item #4.

2. Is this a Criminal or Civil matter?

___ Criminal – Deliver the records to the person who issued the subpoena. You should confirm with that person whether or not they need you to appear in court with the records. It would be appropriate to advise the patient, their guardian or their attorney of the subpoena.

___ Civil – Is Coos County a party to the action?

___ Yes – Contact Counsel's Office.

___ No – Proceed to Item #3.

3. Is the subpoena accompanied by a document that shows <u>either</u> of the following?

☞ A copy of the subpoena was served on the patient, the patient's guardian, or their attorney, at least 24 hours[1] before the subpoena was served on the Health Department; or

☞ The party serving the subpoena cannot find the patient and, if the patient is not represented by an attorney, the party serving the subpoena has attached an affidavit stating:

(a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served;
(b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and
(c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

___ Yes – You should comply with the subpoena and deliver the requested records to the party issuing the subpoena. You should confirm with that party whether or not they need you to appear in court with the records.

___ No – The subpoena is probably not valid. Contact Counsel's Office.

4. If there are any problems or questions, contact Counsel's Office before proceeding.

Attachment B-9 to Agenda
of 1-10-98 Council
Meeting

[1]This will be changed to 15 days beginning January, 1998.

MENTAL HEALTH DEPARTMENT
CHECKLIST FOR HANDLING
SUBPOENAS DUCES TECUM
ORCP 55(H)

1. Does the Mental Health Department have any records concerning the person or persons mentioned in the subpoena?

___ Yes – They must be delivered within five (5) days. Continue with this checklist.

___ No – Notify the person who issued the subpoena that you have no such records. See Item #4.

2. Does the subpoena duces tecum contains the following statement?

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

___ No – You do not need to appear personally in court. The records must be accompanied by an affidavit stating in substance each of the following:

- that the affiant is a duly authorized custodian of the records and has authority to certify records;
- that the copy is a true copy of all the records described in the subpoena;
- the records were prepared by the personnel of the Coos County Health Department or the Coos County Mental Health Department, or persons acting under the control of either, in the ordinary course of business, at or near the time of the act, condition, or event described or referred to therein.

___ Yes – You must appear in court with the records at the time and place indicated on the subpoena.

3. Is this a Criminal or Civil matter?

___ Civil – Is Coos County a party to the action?

___ Yes – Contact Counsel's Office.

___ No – The records may be delivered, within 5 days after receiving the subpoena, as provided below:

- If the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk;
- If the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business;
- In other cases involving a hearing, to the officer or body conducting the hearing at the official place of business;
- If no hearing is scheduled, to the attorney or party issuing the subpoena.

___ Criminal – The records should be sent only to the court or the clerk of the court before which the matter is pending. If the records are subpoenaed for a grand jury proceeding, records should be sent only to the grand jury (via the District Attorney's Office).

4. If there are any problems or questions, contact Counsel's Office before proceeding.

Attachment B-10 to Agenda
of 1-10-98 Council
Meeting

COOS COUNTY OFFICE OF LEGAL COUNSEL
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DAVID R. RIS
County Counsel

DAVID A. CAMERON
Assistant County Counsel

Sept. (?)
~~July~~ 31, 1996

COPY

TO: Pat Orme
Mark Freedman

FROM: David Cameron

RE: Subpoenas of Medical Records

Some situations have come up recently in which the Health or Mental Health Department has received subpoenas for medical records concerning current or former clients. Because the law on such subpoenas was changed by the 1995 Legislature, I thought it may be helpful to set forth some guidelines for your departments to use when faced with subpoenas for medical records.

Subpoenas for medical records are issued under Rule 55 of the Oregon Rules of Civil Procedure (ORCP). This rule deals, generally, with records subpoenaed for civil matters. However, another statute (ORS 136.447) addresses records subpoenaed for criminal matters. I will deal with both below.

Typically, the document served on either you or one of your employees will be a Subpoena Duces Tecum. This is a subpoena commanding the recipient to appear with records or documents. The subpoena should make it clear what documents or records are required. There are a few basic questions to be answered when faced with a Subpoena Duces Tecum.

DO I NEED TO PERSONALLY APPEAR?

The custodian of the records (i.e. the County employee upon whom the subpoena was served) does not always need to appear in person. The party issuing the subpoena generally only wants the records. The subpoena will specifically state if a personal appearance is required. The personal attendance of a custodian of hospital

records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

> The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.
>
> ORCP 55 (H)(4).

If the records are sent without a personal appearance, they must be accompanied by an affidavit stating in substance each of the following:

- that the affiant is a duly authorized custodian of the records and has authority to certify records;
- that the copy is a true copy of all the records described in the subpoena;
- the records were prepared by the personnel of the Coos County Health Department or the Coos County Mental Health Department, or persons acting under the control of either, in the ordinary course of business, at or near the time of the act, condition, or event described or referred to therein.

For your convenience, I have attached forms appropriate for use by the Health Department and the Mental Health Department. They may be printed on department letterhead when necessary.

HOW ARE THE DOCUMENTS TO BE PACKAGED?

ORCP 55H(2)(b) states that 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 discussed in the next section.

WHERE DO THE DOCUMENTS GO?

In cases where the County is not a party to the action, the records may be delivered, within 5 days after receiving the subpoena, as provided below:

- If the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk;
- If the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business;
- In other cases involving a hearing, to the officer or body conducting the hearing at the official place of business;
- If no hearing is scheduled, to the attorney or party issuing the subpoena.

If you receive a subpoena in a case where Coos County is a party to the matter, contact the County Counsel's Office.

WILL THERE BE OTHER DOCUMENTS?

Under the provisions of ORCP 55I(1), ". . . a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is not valid unless proof of service of a copy of the subpoena on the patient or health care recipient, or upon the attorney for the patient or health care recipient . . . is attached to the subpoena served on the custodian or other keeper of medical records." This means that, in addition to the subpoena itself, you should also receive a document that shows a copy of the subpoena was served on the patient. It must have been served on the patient, or their attorney, at least 24 hours before the subpoena was served on the Health or Mental Health Department.

Alternatively, if the party serving the subpoena cannot find the patient, and that patient is not represented by an attorney, the party serving the subpoena may attach an affidavit stating:

(a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served;
(b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and
(c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

A subpoena for medical records is not valid unless there is proof that the patient was served at least 24 hours before the Health or Mental Health Department received the subpoena or the party serving the subpoena attaches an affidavit as outlined above. If there is ever a question about this, please contact County Counsel.

WHAT ABOUT A CRIMINAL CASE?

The majority of subpoenas you receive are likely to involve civil matters. However, you will occasionally receive subpoenas for medical records that are based on criminal cases. In these cases, ORS 136.447 provides that the records may be obtained as outlined above. However, the records should be sent only to the court or the clerk of the court before which the matter is pending. If the records are subpoenaed for a grand jury proceeding, records should be sent only to the grand jury (via the District Attorney's Office). In every case, the records should be packaged as mentioned above.

I hope this answers your questions. Please let me know if I can be of any further assistance.

Attachment

HEALTH DEPARTMENT
CHECKLIST FOR HANDLING
SUBPOENAS DUCES TECUM
ORCP 55(I)

1. Does the Health Department have any records concerning the person or persons mentioned in the subpoena?

___ Yes – Continue to Item #2.

___ No – Notify the person who issued the subpoena that you have no such records. See Item #4.

2. Is this a Criminal or Civil matter?

___ Criminal – Deliver the records to the person who issued the subpoena. You should confirm with that person whether or not they need you to appear in court with the records. It would be appropriate to advise the patient, their guardian or their attorney of the subpoena.

___ Civil – Is Coos County a party to the action?

___ Yes – Contact Counsel's Office.

___ No – Proceed to Item #3.

3. Is the subpoena accompanied by a document that shows either of the following?

☞ A copy of the subpoena was served on the patient, the patient's guardian, or their attorney, at least 24 hours[1] before the subpoena was served on the Health Department; or

☞ The party serving the subpoena cannot find the patient and, if the patient is not represented by an attorney, the party serving the subpoena has attached an affidavit stating:

(a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served;
(b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and
(c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

___ Yes – You should comply with the subpoena and deliver the requested records to the party issuing the subpoena. You should confirm with that party whether or not they need you to appear in court with the records.

___ No – The subpoena is probably not valid. Contact Counsel's Office.

4. If there are any problems or questions, contact Counsel's Office before proceeding.

Attachment B-9 to Agenda
of 1-10-98 Council
Meeting

[1]This will be changed to 15 days beginning January, 1998.

MENTAL HEALTH DEPARTMENT
CHECKLIST FOR HANDLING
SUBPOENAS DUCES TECUM
ORCP 55(H)

1. Does the Mental Health Department have any records concerning the person or persons mentioned in the subpoena?

___ Yes – They must be delivered within five (5) days. Continue with this checklist.

___ No – Notify the person who issued the subpoena that you have no such records. See Item #4.

2. Does the subpoena duces tecum contains the following statement?

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

___ No – You do not need to appear personally in court. The records must be accompanied by an affidavit stating in substance each of the following:

- that the affiant is a duly authorized custodian of the records and has authority to certify records;
- that the copy is a true copy of all the records described in the subpoena;
- the records were prepared by the personnel of the Coos County Health Department or the Coos County Mental Health Department, or persons acting under the control of either, in the ordinary course of business, at or near the time of the act, condition, or event described or referred to therein.

___ Yes – You must appear in court with the records at the time and place indicated on the subpoena.

3. Is this a Criminal or Civil matter?

___ Civil – Is Coos County a party to the action?

___ Yes – Contact Counsel's Office.

___ No – The records may be delivered, within 5 days after receiving the subpoena, as provided below:

- If the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk;
- If the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business;
- In other cases involving a hearing, to the officer or body conducting the hearing at the official place of business;
- If no hearing is scheduled, to the attorney or party issuing the subpoena.

___ Criminal – The records should be sent only to the court or the clerk of the court before which the matter is pending. If the records are subpoenaed for a grand jury proceeding, records should be sent only to the grand jury (via the District Attorney's Office).

4. If there are any problems or questions, contact Counsel's Office before proceeding.

Attachment B-10 to Agenda
of 1-10-98 Council
Meeting

COUNCIL ON COURT PROCEDURES

Established by the Oregon Legislature in 1977

University of Oregon
School of Law
Eugene, Oregon 97403-1221
Telephone: (541) 346-3990
Facsimile: (541) 346-1564

February 13, 1997

John R. Osburn
Bullivant Houser Bailey
Pendergrass & Hoffman, P.C.
Attorneys at Law
300 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089

Dear Mr. Osburn: Re: Amendment to ORCP 55

Thanks for your February 5 letter commenting on the recently promulgated amendment to ORCP 55 which, effective 1-1-98, will change the notice period from 24 hours to 15 days.

I shall distribute copies of your letter to all Council members. Unfortunately, the Council does not meet while the Legislature is in session, and will not meet again until September or early October of this year. Even if the Council were to agree with your suggestion that something like 7 days would be better than 15, any amendment it might promulgate to make that change would not be effective until 1-1-2000. For what it is worth, I tend personally to agree with your comment and suggestion, and expect that trial courts will be showered with more motions to shorten the notice period for

good cause shown than would be necessary with a 7-day period. Regrettably, we won't begin to find out whether that is so until Jan. 1, 1998.

I hope that all is going well with your life and career.

Cordially,

Maury Holland

Maury Holland
Executive Director

Reply ltr on 1t/s: "osburnltr. 297."
OSBURNLT. 297

BULLIVANT HOUSER
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February 5, 1997

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

Re: Proposed Amendments to Oregon Rules of Civil Procedure

Dear Mr. Holland:

I am writing regarding the proposed change to ORCP 55. I am concerned that 15 days' notice would be excessive. I agree that 24 hours' notice is not sufficient, but I feel 15 days' notice would unnecessarily delay discovery. I would propose the notice requirement be seven days, in conformity with ORCP 55D(1).

Thank you for your consideration.

Very truly yours,

John R. Osburn
(UO Law School '89)

JRO:ej

Attachment B-1 to Agenda
of 1-10-98 Council
Meeting

COUNCIL ON COURT PROCEDURES

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

Telephone: (541) 346-3990
FAX: (541) 346-1564

April 20, 1998

TO: The Hon. Anna Brown

FROM: Gilma Henthorne

RE: Legislative history re ORCP 55

I have tried to condense the materials so that you would not have too much material to read. Please let me know if you would like more information. Many notebooks are involved so I could have missed some materials.

Encs.

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of February 10, 1990

Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

Present:	Richard L. Barron	Ronald Marceau
	Richard Bemis	Jack L. Mattison
	Lafayette G. Harter	William F. Schroeder
	Bernard Jolles	Larry Thorp
	Lee Johnson	George A. Van Hoomissen
	Richard T. Kropp	Elizabeth Welch
	Winfrid K.F. Liepe	Elizabeth Yeats
Absent:	Susan Bischoff	John V. Kelly
	Susan P. Graber	Robert B. McConville
	John E. Hart	William C. Snouffer
	Maurice Holland	J. Michael Starr
	Henry Kantor	

(Also present were Fredric R. Merrill, Executive Director, and Gilma J. Henthorne, Management Assistant.)

The meeting was called to order by Chairer Ron Marceau at 9:30 a.m.

The Chairer asked members of the public in attendance to present any statements they wished to make. None was received.

Agenda Item No. 1: Approval of minutes of January 13, 1990. The minutes of the meeting held January 13, 1990 were unanimously approved.

Agenda Item No. 3 (out of order): Report of ORCP 55 H subcommittee (Larry Thorp). Larry Thorp distributed copies of a letter from himself to Judge Graber and Henry Kantor at the meeting. The subcommittee's proposed amendment to 55 H(1) is set forth below:

> **H. Hospital Records**
>
> **H.(1) Hospital.** As used in this section, unless the context requires otherwise, "hospital" means a [hospital] **health care facility defined in ORS**

> **442.014(13)(a) through (d) and** licensed under ORS 441.015 through [441.087] **441.097**, [441.515 through 441.595, 441.815, 441.820, 441.990, and 442.340 through 442.450] **and community health programs established under ORS 430.610 through 430.700**.

As stated in his letter, the language, as revised, includes within the definition of "hospital" all of the following: traditional hospitals which treat the mentally or physically ill; rehabilitation centers; college infirmaries; chiropractic facilities; facilities for the treatment of alcoholism or drug abuse; and, any other facilities which the Health Division determines are classified as "hospitals". Also included are hospital-associated ambulatory surgery centers, which are surgery centers operated by hospitals but independently from the hospital campus; long-term care facilities, including both skilled nursing facilities and intermediate care nursing facilities; free-standing ambulatory surgery centers, such as those operated by many physician groups; and, county mental health clinics. Mr. Thorp stated that all of the above facilities are currently within the scope of ORCP 55 H, with the exception of county mental health clinics. The proposed amendment eliminates a number of facilities which previously were included within the definition of hospitals, including at least the following: free-standing birthing centers; health maintenance organizations; and, hospital facility authorities. Mr. Thorp stated that he did not think the language covers a medical clinic unless it had an associated surgery center.

After a short discussion, a motion was made by Judge Johnson, seconded by Judge Mattison, to adopt the above proposed amendment, and it passed unanimously.

Agenda Item No. 2: Report of judgments subcommittee (Judge Mattison). Judge Mattison reported that the subcommittee was considering two alternatives: one alternative would always treat the award of attorney fees and costs and disbursements as a separate judgment; the other alternative would always require that the award of attorney fees and costs and disbursements be included in the principal judgment. The first alternative would be the most consistant with the present statutes governing appeal, which require a separate notice of appeal for an award of attorney fees and costs and disbursements. The second alternative would treat the attorney fees and costs and disbursements as another claim in the case, with no final judgment until those matters were settled, unless a partial judgment was ordered under ORCP 67 B.

Judge Mattison also reported that the subcommittee was considering a recommendation that would extend the time for appeal from the principal judgment until 30 days after entry of

February 9, 1990

M E M O R A N D U M

TO: Members, COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: Amendments to Federal Rules of Civil Procedure

The following is a brief summary of the proposed amendments to the Federal Rules of Civil Procedure published June 12, 1989, 127 FRD 237. It only covers those amendments which would have any relationship to the ORCP. For example, the proposed amendments contain a substantial revision of FRCP 4 governing service of process. Our provisions in this area are so different that the proposed federal amendment has no relevance to us.

My thanks to Ed Brunet of Lewis and Clark Law school for information about the hearings and the national reaction to the proposed change.

The proposed amendments published on June 12, 1989 are simply a preliminary draft of a subcommittee of the Judicial Conference Standing Committee on Rules of Practice and Procedure which have been circulated for comment. They have not been accepted by the committee or recommended by the Judicial Conference to the Supreme Court. They were subject to hearings in San Francisco and Chicago last month and, as noted below, at least some of them were subject to substantial criticism and are likely to change.

FRCP 5 - ORCP 9

The amendments would allow facsimile service of papers. That was already put into the ORCP by the last legislature. They would also require proof of service, which is already covered by ORCP 9 C. They would also add the following to the filing section: "The clerk shall not refuse to accept for filing any instrument presented for that purpose solely because the instrument is not presented in proper form as required by these rules or any local rules." This is directly contrary to ORCP 9 E which authorized clerks to refuse to accept papers which do not meet minimum requirements as to form. The comment to the federal rule suggests that passing upon the correctness of form of documents is not a proper role for clerks.

FRCP 14 - ORCP 22

The proposed amendment would add the following to FRCP

Exhibit 1 to minutes of Council meeting held 3/10/90

14(a) [ORCP 22 C(1)]: "A copy of all previous pleadings in the actions shall accompany the third party complaint or be provided promptly after service." The comment suggests this is more efficient that forcing the third party defendant to secure these papers from the clerk's office.

FRCP 15 - ORCP 23 C

The proposed amendment would change the relation back provision in FRCP 15(c) so that an amendment changing the party or the name of a party against whom the claim is asserted would relate back as long as the proper party had effective notice of the action within the time permitted for service of summons under FRCP 4. Under the federal system, the filing satisfies the limitations period, and FRCP 4 requires service within 120 days of filing. This change was intended to reverse the result in Schiavone v. Fortune, 106 S. Ct. 2379 (1986), where the Court correctly held the present rule (as does ORCP 23 C) requires an effective limitations period. The Schiavone rule is more consistent with Oregon practice which requires service within the limitations period.

FRCP 26 - ORCP 36

The amendments would add a new reference in the description of discovery methods [our 36 A] to discovery in another country provided by treaty or convention. It is attached as Exhibit A. They also would add a new subsection to 26(b) [our 36 B] that provides that a party claiming privilege or work product protection must provide certain information. This is attached as Exhibit B. Neither of these seem terribly important in Oregon litigation, but they might prove useful.

FRCP 28 - ORCP 36

FRCP 28(b) [our 38 B] would be amended to make effective use of the Hague convention on the Taking of Evidence Abroad in Civil or Commercial Matters and similar treaties. The amendment is attached as Exhibit C. The language in our rule is slightly different but there is enough similarity that we might benefit from the same change. The reference to "letter of request" rather than "letters rogatory" might be a good idea.

FRCP 30 - ORCP 39

A number of changes are contemplated in the federal oral deposition rule to accommodate nonstenographic depositions. We have already addressed the problem in our rule which seems to be working well.

FRCP 34 and 45 - ORCP 43 and 55

The amendments contemplate a substantial revision of FRCP 45 governing subpoenas. Some of the changes relating to issuance of subpoenas and out-of-district subpoenas would be inapplicable to Oregon practice, but the amendments would also establish use of a subpoena, without scheduling a deposition, to force production and inspection of material in the hands of a non-party witness. This would be similar to what the Council did with hospital records during the last biennium. As a general procedure, it might be useful and save expenses. It also would allow use of a subpoena to compel the inspection of premises in the possession of a nonparty. At the present time, under both the ORCP and the federal rule, this type of discovery requires initiation of a separate lawsuit. A full copy of the changes to FRCP 34 and 45 is attached with the commentary as Exhibit D.

FRCP 35 - ORCP 44

Congress amended the federal rule to include psychologists with physicians as persons who could conduct mental examinations. This is similar to the amendment to ORCP 44 by the Oregon legislature last year. The rule now would be amended to provide for mental examinations by "an examiner licenced or certified by the law of the place of the examination." The purpose is to extend the mental examination authority to any person licenced to provide health diagnostic services.

FRCP 41, 50 and 52 - ORCP 54, 60, 62 and 63

The amendments would change the motions for directed verdict and judgment NOV in a jury case into a motion for judgment as a matter of law, and the motion for dismissal in a non-jury case into a motion for judgment on partial findings. In the main, the motions would remain the same, but the court would be empowered to enter such judgment or findings at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof. In other words, the court would not have to wait until a party rested to grant a judgment as a matter of law.

Whether or not this change is worth serious consideration, it came under so much fire at the public hearings that it is probably going to be changed if it goes forward at all. We should perhaps save our energy until we see more clearly what the Judicial Conference intends to do.

FRCP 56 - ORCP 47

One of the most extensive changes contemplated by the proposed amendments is a wholesale revision of FRCP 56, the summary judgment rule. The amendment would among other things

(1) expand use of summary determination of facts in the context of the pretrial conference, (2) describe the procedures to be followed in making or responding to the motion in much greater detail, (3) allow summary establishment of the controlling law for the case, (4) clarify the standard for summary judgment and the relationship to directed verdict, and (5) clarify the burdens upon the party making and opposing the motion. This supposedly is primarily in response to Celotex Corp. v Catrett, 106 S. Ct. 2548 (1986). These changes are easily the most controversial in the rule and have attracted a great deal of adverse comment. Whether or not they would be desirable or fit Oregon practice, we should wait until we see what changes are made in response to the comment received.

Encs.

Exhibit A

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental

New material underlined. Deleted material lined through.
PROPOSED RULES

examinations; and requests for admission. *If an applicable treaty or convention provides for discovery in another country, the discovery methods agreed to in such treaty or convention shall be employed; but if discovery conducted by such methods is inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the methods here provided in addition to those provided by such convention or treaty.*

(b) DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

[illegible]

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The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(2) INSURANCE AGREEMENTS. * * * * *

(3) TRIAL PREPARATION: MATERIALS. * * * * *

(4) TRIAL PREPARATION: EXPERTS. * * * * *

(5) CLAIMS OF PRIVILEGE OR WORK PRODUCT PROTECTION. Where a claim of privilege or work product protection is asserted in objecting to any interrogatory or document demand, the party asserting the privilege shall identify with respect to each communication the nature and basis of the privilege claimed. In addition, the party shall provide as much of the following information as is not encompassed by the privilege: (A)

[illegible]

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its type; (B) its general subject matter and purpose; (C) its date; (D) the names of persons making or receiving the communication or a copy thereof or, if the communication was oral, of those present when it was made; (E) their relationship to the author or speaker; and (F) any other information needed to determine the applicability of the privilege or protection.

ADVISORY COMMITTEE NOTES

SUBDIVISION (a). Language is added to this subdivision to reflect the policy of accommodation to internationally agreed methods of discovery expressed in the concurring opinion in *In re Societe Nationale Industrielle Aerospatiale*, 482 U.S. 2542, 2557-2568 (1987). Attorneys and judges should be cognizant of the adverse consequence for international relations of unduly intrusive discovery methods that offend the sensibilities of those governing other countries. *See generally* Weis, *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903 (1989). If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that other methods should not be employed if the approved methods are adequate to meet the need of the litigant for timely access to the information. . .

On the other hand, the language added to the rule also requires that discovery proceed in a manner that is not inequitable." International litigants should not be placed in a favored position as compared to American litigants similarly situated, especially in commercial matters with respect to which the similar American litigants may be their economic competitors. Especially, an international litigant using the provisions of Rule 26-37 should not be permitted to use the Hague Convention or a similar international agreement to create obstacles to discovery by an adversary. In general, full discovery should be available equally against all who litigate in the federal courts. Where the impediment to discovery is imposed by public authority not at the request of the international litigant, accommodation may be necessary to reconcile the requirement of this rule that discovery be equitable to the obligations imposed by the treaty.

SUBDIVISION (b). A new paragraph (b)(5) is added. This provision is new and is based on successful experience with a local rule. Its purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with as much information as possible short of violation of the claimed privilege. The revision also aims to enable the discovering party to challenge claims of privilege that are unsupportable or overbroad.

* * * *

(b) IN FOREIGN COUNTRIES. *Subject to the provisions of Rule 28(a)* ~~In a foreign country~~, depositions may be taken *in a foreign country* (1) *pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3)* on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (~~2~~ *4*) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony~~, or (3) pursuant to a letter rogatory~~. A commission or a ~~letter~~ rogatory *of request* shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory *of request* that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory *of request* may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or by descriptive title. A letter rogatory *of request* may be addressed "To the appropriate Authority in [here name the country]." *When a letter of request or any other device is used pursuant to any applicable treaty or convention it shall be captioned in the form prescribed by that treaty or convention.* Evidence obtained in response to a letter rogatory *of request* need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

ADVISORY COMMITTEE NOTE

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties which the United States may enter into in the future, as sources of additional methods for taking depositions abroad. Pursuant

to revised Rule 26(a), the party taking the deposition is obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony cannot be taken under oath.

The term "letter of request" has been substituted in the rule for the former term, "letter rogatory" because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of letter of request. There are several other minor changes that are designed merely to carry out the intent of the other alterations.

Ex #19 A X3

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES.

* * * *

(c) PERSONS NOT PARTIES. ~~This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.~~

* * * * *

ADVISORY COMMITTEE NOTE

This amendment reflects the change effected by revision of Rule 45 to provide for subpoenas to compel non-parties to produce documents and things and to submit to inspections of premises. The deletion of the text of the former paragraph is not intended to establish a preclusion of an independent action for production of documents or things or for permission to enter upon land, but such actions should no longer be necessary in light of this revision.

RULE 45. SUBPOENA

(a) ~~FORM-ATTENDANCE-OF-WITNESSES; FORM; ISSUANCE.~~

(1) Every subpoena shall be issued ~~by the clerk~~ under the seal of the court, shall state the name of the court and the title of the action and command each person to whom it is directed to attend and give testimony *or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises,* at the time and place therein specified*, and shall set forth the text of subdivisions (c) and (d) of this rule. A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.*

(2) A subpoena commanding attendance at a trial or hearing shall be issued by the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall be issued by the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall be issued by the court

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r the district in which the production or inspection to be made.

(3) The clerk shall issue a subpoena, or--a bpoena--for--the--production--of--documentary--evidence, gned and sealed but otherwise in blank, to a party questing it, who shall fill it in before service. An torney as officer of the court may also issue a bpoena in the name of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) Fee--Payment--of--Documentary--Evidence.--A subpoena may no--command--the--person--to--whom--it--is--directed--to oduce--the--books,--papers,--documents,--or--tangible ings--designated--therein;--but--the--court,--upon--motion de--promptly--and--in--any--event--at--or--before--the--time ecified--in--the--subpoena--for--compliance--therewith,--may]--quash--or--modify--the--subpoena--if--it--is--unreasonable --oppressive--or--(2)--condition--denial of--the--motion on--the--advancement--by--the--person--in--whose--behalf--the bpoena--is--issued--of--the--reasonable--cost--of--producing e--books,--papers,--documents,--or--tangible--things.

(c) Service.

(1) A subpoena may be served by the--marshal,--a deputy--marshal,--or--by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(d)--Subpoena--for--Taking--Depositions;--Place--of--Examination

(1)--Proof--of--service--of--a--notice--to--take--a deposition--as--provided--in--Rules--30(b)--and--31(a) constitutes--a--sufficient--authorization--for--the--issuance by--the--clerk--of--the--district--court--for--the--district--in which--the--deposition--is--to--be--taken--of--subpoenas--for the--persons--named--or--described--therein. Proof--of service--may--be--made--by--filing--with--the--clerk--of--the district--court--for--the--district--in--which--the--deposition is--to--be--taken--a--copy--of--the--notice--together--with--a statement--of--the--date--and--manner--of--service--and--of--the names--of--the--persons--served,--certified--by--the--person

sade-service. The-subpoena-may-command-the-person hom-it-is-directed-to-produce-and-permit-inspection copying-of-designated-books,-papers,-documents,-or ible-things-which-constitute-or-contain-matters in-the-scope-of-the-examination-permitted-by-Rule),-but-in-that-event-the-subpoena-will-be-subject he-provisions-of-Rule-26(c)-and-subdivision-(b)-of -rule.

The-person-to-whom-the-subpoena-is-directed-may, in--10-days-after-the-service-thereof-or-on-or re--the--time--specified--in--the--subpoena--for liance-if-such-time-is-less-than-10-days-after ice,--serve-upon-the-attorney-designated-in-the oena-written-objection-to-inspection-or-copying-of -or-all-of-the-designated-materials.---If-objection made,-the-party-serving-the-subpoena-shall-not-be itled--to--inspect--and--copy--the--materials--except suant--to--an--order--of--the--court--from--which--the poena-was-issued.---The-party-serving-the-subpoena y-if-objection-has-been-made,-move-upon-notice-to -deponent-for-an-order-at-any-time-before-or-during -taking-of-the-deposition.

(2)--A-person-to-whom-a-subpoena-for-the-taking-of leposition-is-directed-may-be-required-to-attend-at -place-within-100-miles-from-the-place-where-that son-resides,--is-employed-or-transacts-business-in

[FIXED]

as-is-fixed-by-an-order-of-court.

(c)--Subpoena-for-a-Hearing-or-Trial.

(1)---At-the-request-of-any-party-subpoenas-for attendance-at-a-hearing-or-trial-shall-be-issued-by-the clerk-of-the-district-court-for-the-district-in-which the-hearing-or-trial-is-held.

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, A a subpoena requiring-the-attendance-of-a-witness-at-a-hearing-or trial may be served at any place within the district *of the court in whose name it is issued*, or at any place without the district that is within 100 miles of the place of the deposition, hearing, or trial, *production, or inspection* specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where-the district--court-is-held *of the deposition, hearing, trial, production or inspection specified in the subpoena*. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country *who is a national or resident of the United States* shall issue under the circumstances and

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the manner and be served as provided in Title 28, .C. § 1783.

(3) Proof of service when necessary shall be made filing with the clerk of the court in whose name the poena is issued a statement of the date and manner service and of the names of the persons served, tified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the uance and service of a subpoena shall take sonable steps to avoid imposing undue burden or pense on a person subject to that subpoena. The rt in whose name the subpoena was issued shall force this duty and impose upon the party or attorney breach of this duty an appropriate sanction, which y include, but is not limited to, lost earnings and a sonable attorney's fee.

(2) A person commanded to produce and permit spection and copying of designated books, papers, uments or tangible things or inspection of premises l need not appear at the place of production or spection unless also commanded to appear for position, hearing, or trial, and (B) subject to bdivision (d)(2) of this rule, may, within 14 days ter service of the subpoena or before the time ecified 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 or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises 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 the production.

(3)(A) On timely motion, the court in whose name a subpoena was issued shall quash the subpoena

(i) if it fails to allow reasonable time for compliance;

(ii) if it requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) to the extent that the subpoena requires disclosure of privileged or other

protected matter and no exception or waiver applies, or

(iv) if it subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an expert opinion or information not describing specific events or occurrences in dispute and resulting from the person's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial or to produce designated materials,

a court may quash the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated for the burden imposed, the court may order appearance or production only upon specified conditions.

(d) Response to Subpoena to Produce Documents.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) Where a claim of privilege or work product protection is asserted in objecting to any document demand, the person asserting the privilege shall identify the nature and basis of the privilege claimed. In addition, the person shall provide as much of the following information with respect to each document as is not encompassed by the privilege: (A) its type; (B) its general subject matter and purpose; (C) its date; (D) the name of the author and of the addressee and other persons receiving it; (E) their relationship of the author, and (F) such other information as may be needed to determine the applicability of the privilege or protection.

(e) Contempt. Failure by any person without adequate cause to obey a subpoena served upon that person may be deemed a contempt of the court from which in whose name the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

ADVISORY COMMITTEE NOTES

Purposes of Revision. The purposes of this revision are (1) to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence; (2) to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties; (3) to facilitate service of subpoenas for depositions or productions of evidence at places distant from the district in which an action is proceeding; (4) to enable the court to compel a witness found within the state in which the court sits to attend trial; (5) to clarify the organization of the text of the rule.

Subdivision (a). This subdivision is amended in five respects.

One change authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced.

Second, the text makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. The new text changes the result in cases such as *Cates v. LTV Aerospace Corporation*, 480 F.2d 620 (5th Cir. 1973). The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34.

Third, the amended text requires that the subpoena include a statement of the rights and duties of witnesses by setting forth in full the text of the new subdivisions (c) and (d).

Fourth, the revision modifies the requirement that a subpoena be issued by the clerk of court. Provision is made for the issuance of subpoenas by attorneys as officers of the court. Inasmuch as the present role of the clerk is merely to provide the appropriate form of subpoena, there is no substantive change effected by allowing the attorneys to issue the instruments without action of the clerk. This revision facilitates the issuance of subpoenas for depositions and production orders in districts other than the district in which a trial or hearing is held. The former rule resulted in some delay caused by the need to

secure forms from clerks' offices some distance from the place at which the action proceeds.

In authorizing attorneys to issue subpoenas in the name of distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party. This change does not itself effectively enlarge the burden on the witness, because the limits on the non-party's duty to travel are maintained.

A subpoena for a deposition must still be issued in the name of the court in which the deposition or production would be compelled. Accordingly, a motion to quash such a subpoena if it overbears the limits of the subpoena power must be presented to the court for the district in which the deposition would occur. Likewise, the court in whose name the subpoena is issued is responsible for its enforcement.

Fifth, the revised rule authorizes the issuance of a subpoena to compel the inspection of premises in the possession of a non-party. Rule 34 has authorized such inspections of premises in the possession of a party as discovery compelled under Rule 37, but prior practice required an independent proceeding to secure such relief ancillary to the federal proceeding when the premises were not in the possession of a party. Practice in some states has long authorized such use of a subpoena for this purpose without apparent adverse consequence.

Paragraph (b)(1). This paragraph contains the text of the former subdivision (c). The reference to the United States marshal and deputy marshal is deleted because of the infrequency of the use of these officers for this purpose. Inasmuch as these officers meet the age requirement, they may still be used if available.

A provision requiring service of prior notice pursuant to Rule 5 of compulsory pretrial production or inspection has been added to this paragraph (b)(1). The purpose of such notice is to afford other parties an opportunity to object to the production or inspection. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may be produced.

Paragraph (b)(2). This paragraph retains language merly set forth in subdivision (a) and extends its lication to subpoenas for depositions or production.

Paragraph (b)(3). This paragraph retains language merly set forth in paragraph (d)(1) and extends its lications to subpoenas for trial or hearing or duction.

Subdivision (c). This provision is new and states the hts of witnesses. It is not intended to diminish rights ferred by Rules 26-37 or any other authority.

Paragraph (c)(1). This paragraph gives application to principle stated in Rule 26(g), specifying liability for nings lost by a non-party witness as a result of a misuse the subpoena. No change in existing law is thereby ected. Abuse of a subpoena is an actionable tort, *Board Ed. v. Farmingdale Classroom Teach. Ass'n*, 38 N.Y.2d 397, N.Y.S.2d 635, 343 N.E.2d 278 (1975), and the duty of the orney to the non-party is also embodied in Model Rule of fessional Conduct 4.4.

Paragraph (c)(2). This provision retains language from former subdivision (b) and paragraph (d)(1). The 10-day riod for response to a subpoena is extended to 14 days to id the complex calculations associated with short time riods under Rule 6 and to allow a bit more time for such jections to be made.

Paragraph (c)(3). This provision explicitly authorizes quashing of a subpoena as a means of protecting a tness from misuse of the subpoena power. It replaces and larges on the former subdivision (b) of this rule and cks the provisions of Rule 26(c). While largely petitious, this rule is addressed to the witness who may ad it on the subpoena, where it is required to be printed the revised paragraph (a)(1) of this rule.

Subparagraph (c)(3)(A) identifies those circumstances which a subpoena must be quashed. It restates the former ovisions with respect to the limits of mandatory travel at are set forth in the former paragraphs (d)(2) and)(1), with one important change. Under the revised rule, federal court can compel a witness to come from any place the state to attend trial, whether or not the local state w so provides. This extension is subject to the alification provided in the next paragraph which thorizes the court to condition enforcement of a subpoena pelling a non-party witness to bear substantial expense attend trial.

Clause (c)(3)(A)(iv) requires the court to protect all persons from undue burden imposed by the use of the subpoena power. Illustratively, it might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens.

Subparagraph (c)(3)(B) identifies those circumstances in which a subpoena should be quashed unless the party serving the subpoena shows a substantial need and the court can devise an appropriate accommodation to protect the interests of the witness.

Clause (c)(3)(B)(i) corresponds to Rule 26(c)(7).

Clause (c)(3)(B)(ii) provides appropriate protection for the intellectual property of the non-party witness. A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts. Experts are not exempt from the duty to give evidence, even if they cannot be compelled to prepare themselves to give effective testimony, *E.g., Carter-Wallace, Inc. v. Otte*, 474 F.2d 529 (2d Cir. 1972), but compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services. See generally Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA.L.REV. 71 (1984); Note, *Discovery and Testimony of Unretained Experts*, 1987 DUKE L.J. 140. Arguably the compulsion to testify can be regarded as a "taking" of intellectual property. The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash as provided in the final sentence of subparagraph (c)(3)(B); that requirement is the same as that necessary to secure work product under Rule 26(b)(3) and gives assurance of reasonable compensation. The Rule thus approves the accommodation of competing interests exemplified in *United States v. Columbia Broadcasting System, Inc.*, 666 F.2d 364 (9th Cir. 1982). See also *Wright v. Jeep Corporation*, 547 F. Supp. 871 (E.D. Mich. 1982).

As stated in *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976), the district court's discretion in these matters should be informed by "the degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the

possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; and the degree to which the witness is able to show that he has been oppressed by having continually to testify... ."

Clause (c)(3)(B)(iii) protects non-party witnesses who may be subjected to considerable burden in performing their duty to supply pertinent information. This provision authorizes the court to impose the costs of producing extensive documentary materials on the party seeking them. The court is not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party. See, *e.g., United States v. Columbia Broadcasting System, Inc.*, 666 F.2d 364 (9th Cir. 1982). The provision also authorizes the court to condition a subpoena requiring travel of more than 100 miles on reimbursement of any substantial costs of compliance.

Subdivision (d). This provision is new. Paragraph (1) extends to non-parties the duty imposed on parties by the last paragraph of Rule 34(b), which was added in 1980.

Paragraph (2) is new and is based on successful experience with a local rule. It corresponds to revised Rule 26(b)(5). Its purpose is to provide a party whose discovery is constrained by a claim of privilege with as much information as possible without violation of the claimed privilege. The revision also aims to enable the discovering party to challenge claims of privilege that are unsupportable or overbroad.

Subdivision (e). This provision retains most of the language of the former subdivision (f).

"Adequate cause" for a failure to obey a subpoena remains undefined. In at least some circumstances, a non-party might be guilty of contempt for refusing to obey a subpoena even though the subpoena manifestly overreaches the appropriate limits of the subpoena power. *E.g., Walker v. City of Birmingham*, 388 U.S. 307 (1967). But, because the command of the subpoena is not in fact one uttered by a judicial officer, contempt should be very sparingly applied when the non-party witness has been overborne by a party or attorney. The language added to subdivision (f) is intended

[illegible]

to assure that result where a non-party has been commanded, on the signature of an attorney, to travel greater distances than can be compelled pursuant to this rule.

attached to these minutes as Exhibit No. 1, and prepare a comprehensive proposal (starting with the April 9, 1990 draft which had incorporated the changes made by the Council at its March 10, meeting) which they could mail to Council members for their input prior to the Council's next meeting. The subcommittee would also consider the Executive Director's proposed revision of ORCP 68 C(2) (attached to these minutes as Exhibit No. 2) **(Item No. 4 on the agenda)**. Judge Liepe reviewed the proposals which he had made (set out in Exhibit No. 1), and a discussion followed. The Council decided that it would await the proposal of the subcommittee.

Agenda item No. 5: Revision of ORCP 55 relating to discovery by subpoena (attached to these minutes as Exhibit No. 3). The Executive Director had been asked at the Council's March 10, 1990 meeting to prepare an amendment to ORCP 55 to allow a subpoena to be used as a discovery tool with respect to third parties without the necessity of scheduling a deposition. The Executive Director's proposed amendments to ORCP 55 are an adaptation of the proposed changes to Federal Rule 45 to conform with the Oregon form. It was suggested that the draft may be unclear as to whether a non-party has to file a motion for relief from a subpoena or whether the moving party has to file a motion to compel. It was pointed out that the only thing different about this type of subpoena with respect to production is that the subpoena does not require the individual to give testimony. Regarding inspection of premises, concern was expressed that there may be some constitutional issues involved having to do with the right of privacy. It was the consensus of the Council that the Executive Director should prepare a new draft to exclude inspection of premises.

Agenda item No. 6: Report of discussion with John Salisbury regarding Uniform Foreign Money Claims. The Executive Director will report concerning this item at the Council's next meeting.

OTHER MATTERS:

The Chair reminded the Council that he would be attending the "Law in the 90's Conference" at the Rippling River Resort in Welches, Oregon, on April 27 - 29. He asked whether anyone had any suggestions for him to bring to the Conference. Henry Kantor said that cooperation among Bar committees, the Executive Department and Judicial Department, and organizations should be further encouraged so that there would not be a repetition of the problems that occurred during the last legislative session, stressing the necessity of presenting civil procedure matters to the Council.

Mike Starr reported that Chief Justice Peterson had appointed a committee to look at the rules of appellate procedure.

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

* * * *

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

# # #

SUBPOENA

RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and may require[s] the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce evidence or permit inspection at a particular time and place. [It also] A subpoena requiring attendance to testify as a witness requires that the witness remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For production of [documentary] evidence or to permit

EXHIBIT NO. 3 TO MINUTES OF COUNCIL MEETING HELD APRIL 2], 1990

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inspection. A subpoena may [also] command the person to whom it is directed to produce and permit inspection and copying of designated [the] books, papers, documents, or tangible things [designed therein; but] in the possession, custody or control of that person, or to permit inspection of premises, at the time and place specified therein. A command to produce evidence or permit inspection 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 or inspection of premises 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 or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises 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 evidence or inspection of premises the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may

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(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 or permitting inspection of premises.

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 for evidence or to permit inspection: (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

EX 3-3

may be issued by the judge, justice, or other officer before whom the attendance is required.

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

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

D(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party 14 days before the time designated for production or inspection in the manner prescribed in Rule 9, unless the court orders a shorter period of notice.

D(2) **Service on law enforcement agency.**

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D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

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

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

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

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

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

Service of subpoena by mail may not be used for a subpoena commanding production of evidence or inspection of premises, 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

EX 3-6

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 evidence or inspection of premises; place of production or 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 evidence or inspection of premises before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. [The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 36 B, but in that event the subpoena will be subject to the provisions of Rule 36 C and section B of this rule.]

F(2) **Place of examination.** A resident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce evidence only in the county wherein such person resides, is employed or transacts business in person,

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or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend or to produce evidence only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

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

H. Hospital records.

H(1) **Hospital.** As used in this section, unless the context requires otherwise, "hospital" means a hospital licensed under ORS 441.015 through 441.087, 441.525 through 441.595, 441.815, 441.820, 441.990, and 441.342 through 441.450.

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

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a

EX 3-8

party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than [ten] <u>14</u> days prior to service of the

EX 3-1

subpoena on the hospital.

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule.

H(3) **Affidavit of custodian of records.**

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital,

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staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) **Personal attendance of custodian of records may be required.**

H(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the

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custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

COMMENT

The above amendments to ORCP 55 are an adaptation of the proposed changes to FR 45 which appear at the end of the February 9, 1990 memo relating to amendments of the federal rules. I attempted to simplify the changes as well as adapt them to the Oregon form. The federal amendment does not seem particularly well drafted and contains a lot of useless and repetitive material. I simply eliminated 45 (c)(1) and (3) and 45 (d) and (e) from the proposed federal rule.

The one thing I am not sure of is eliminating 45 (d)(1). It has some information about compliance with the subpoena. Other than that, the federal rule does not state exactly how the recipient of the subpoena complies with it. Generally, it would seem the requirement would be to show up at the time and place required with the documents requested. I assume the subpoena could contain some specific instructions if the party wishing it so desired. Because the mode of compliance with the hospital subpoena is so specific, I just left section 55 H alone.

sentence as revised. The motion passed unanimously.

The Council discussed whether the language "signed in accordance with Rule 17" on line 4 of C(4)(b) should be included. The Council felt that the reference to signing in accordance with Rule 17 was unnecessary because Rule 17 already requires signing of the objections. The Executive Director was asked to include in the staff comment that there was no intent to change the existing requirement that the objections be signed as required by Rule 17.

The Council next discussed a letter from Judge Elizabeth Welch dated June 4, 1990 (attached as Exhibit No. 2), which was distributed at the meeting. In that letter, Judge Welch recommended that the exception in C(1)(a) for dissolution cases should be deleted. It was decided to defer final consideration of this matter until the Council's next meeting. In the meantime, Judge Johnson stated he would confer with Judge Welch regarding her proposal. It was also suggested that Judge Welch's letter be sent to the domestic relations section of the Oregon State Bar.

The Chair then asked for a motion to tentatively adopt the proposed amendments to Rule 68 and ORS 19.026(2) (as further amended at this meeting), and a motion was made by Judge Mattison, seconded by Bernie Jolles, to do so. The motion passed unanimously.

The Chair stated he would send the revised and tentatively adopted judgments subcommittee report to the State Court Administrator's committee for its review and comment, as well as to the Procedure & Practice Committee of the Oregon State Bar and to the committee (appointed by Chief Justice Peterson) which is working on the revision of ORS 19.

Agenda Item No. 6: Revision of ORCP 68 C(2) (Executive Director). The action taken by the Council relating to this item is listed out of order because it logically follows the Council's actions taken concerning the judgments subcommittee report regarding ORCP 68 C. Attached as Exhibit No. 3 is a separate amendment of 68 C(2). After discussion, a motion was made by Jack Mattison (seconded by Henry Kantor) and unanimously passed to incorporate the changes as shown in Exhibit No. 3 (with the substitution of the word "deemed" for "taken as" in the thirteenth line of that exhibit) in the judgments subcommittee May 30, 1990 report. It was noted that several changes in 68 C(2) by the judgments subcommittee had been adopted under Agenda Item No. 4 and should be included in the final revised version of 68 C(2).

Agenda Item No. 5: Revision of ORCP 55 (Executive

Director). The Executive Director had prepared a redraft of the proposed amendments to Rule 43 and Rule 55 to exclude inspection of premises (attached to these minutes as Exhibit No. 4). He stated that the redraft eliminates inspection of premises and restricts the administrative subpoena to producing evidence and permitting inspection of that evidence at a particular time and place. A letter from Larry Thorp dated June 6, 1990 was distributed at the meeting. In his letter, Larry Thorp suggested further revisions to the latest draft prepared by the Executive Director. A discussion followed.

Elizabeth Yeats pointed out that throughout the redraft of Rule 55, reference is made to producing "evidence" and stated that the term "evidence" seemed more limited than the scope of discovery under 36 B. It was decided that "books, papers, documents, or tangible things" be substituted for "evidence" throughout. It was also decided that, where appropriate, "permit inspection" would be changed to "permit inspection thereof". The Council decided not to exclude the first sentence as shown in the redraft.

It was also decided to change the word "till" to "until" in the seventh line of 55 A and to delete "inspection of premises" from the third sentence of Rule 55 B.

After discussion, the Council also decided to adopt the new sentence proposed by Larry Thorp (in his June 6, 1990 letter) to be placed at the end of 55 D(1) instead of the sentence shown in the redraft. With further amendments, that sentence would read as follows:

> "**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 fourteen days before the time designated for production, unless the court orders a shorter period.**"

Rick Barron moved, seconded by Judge Snouffer, to tentatively adopt the redraft of Rules 43 and 55 (as further amended at this meeting). The motion passed unanimously.

Agenda Item No. 7: Uniform Foreign Money Claims Act - John Salisbury (Executive Director). The Executive Director reminded the Council that he had received a letter from John Salisbury stating that the Uniform State Laws Committee had adopted for promulgation the Oregon Uniform Foreign Money Claims Act. He stated that the Act primarily relates to currency conversion and how claims against foreign defendants are described. The Executive Director stated that the only relation it bears to the

REDRAFT IN RESPONSE TO SUGGESTIONS AT APRIL 21, 1990 MEETING

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

* * * *

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

# # #

SUBPOENA

RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and may require[s] the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce evidence or permit inspection at a particular time and place. [It also] A subpoena requiring attendance to testify as a witness requires that the witness remain till 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

EXHIBIT NO. 4 TO MINUTES
OF COUNCIL MEETING HELD
JUNE 9, 1990

EX 4-1

of the court and the title of the action.

B. For production of [documentary] evidence or to permit inspection. A subpoena may [also] command the person to whom it is directed to produce and permit inspection and copying of designated [the] books, papers, documents, or tangible things [designed therein; but] in the possession, custody or control of that person at the time and place specified therein. A command to produce evidence and permit inspection 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 or inspection of premises 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 evidence the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance

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therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance.

C(1) **By whom issued.** A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce for evidence and to permit inspection: (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

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whom the attendance is required.

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

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

D(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Notice of any commanded production of documents and things before trial shall be served on each party 14 days before the time designated for production or inspection in the manner prescribed in Rule 9, unless the court orders a shorter period of notice.

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

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made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

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

Under the following circumstances, service of a subpoena to

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

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

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

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

Service of subpoena by mail may not be used for a subpoena commanding production of evidence, 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

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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 evidence; 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 evidence before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. [The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 36 B, but in that event the subpoena will be subject to the provisions of Rule 36 C and section B of this rule.]

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

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subpoena, or at such other convenient place as is fixed by an order of court.

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

H. **Hospital records.**

H(1) **Hospital.** As used in this section, unless the context requires otherwise, "hospital" means a [hospital] health care facility defined in ORS 442.014(13)(a) through (d) and licensed under ORS 441.015 through [441.087, 441.525 through 441.595, 441.815, 441.820, 441.990, and 442.342 through 442.450] 441.097 and community health programs established under ORS 430.610 through 430.700.

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

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of

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the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than [ten] 14 days prior to service of the subpoena on the hospital.

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H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule.

H(3) **Affidavit of custodian of records.**

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either,

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in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) **Personal attendance of custodian of records may be required.**

H(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving

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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.

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regarding adoption of a rule providing for withdrawal by attorneys (attached as Exhibit L). Consideration by the Council of this agenda item was deferred until the next biennium.

Agenda Item No. 9: Letter from Keith Burns regarding ORCP 39 C(7) (attached as Exhibit M). Consideration by the Council of this agenda item was deferred until the next biennium.

Agenda Item No. 4: Proposed amendments; comments received; Executive Director's memorandum dated September 28, 1990 (attached as Exhibit N); letter from Attorney Ivan S. Zackheim dated October 11, 1990 (attached as Exhibit O).

The Council considered the Executive Director's memorandum as set out below.

Item I of memorandum

The Council has tentatively adopted the proposed amendments to ORCP 68 C(2) (suggested by Judge Welch).

Item IIA of memorandum

The Council discussed the comments of Craig West, Denny Hubel, and Ivan Zackheim relating to the proposed amendment to ORCP 7 D. Council members indicated that Craig West's suggestion that ORCP 7 D(7) might be read to require that all forms of service available under Rule 7 be attempted before service on the Motor Vehicle Division is allowed merited further consideration. The Chairer asked the Executive Director to furnish a draft amendment that might clarify the rule for consideration at the December meeting. The Executive Director was also asked to modify the comment to Rule 7 in response to the suggestions by Craig West and Denny Hubel.

Item IIB of memorandum

The Council discussed the comments of Denny Hubel, Win Calkins, and Lauren Underwood and James Hiller.

After discussion, Judge Johnson made a motion, seconded by John Hart, to adopt James Hiller's proposal set out on page 3 of the memorandum. Larry Thorp moved to amend the motion to provide that the statement of noneconomic damages limit recovery, but that the jury not be instructed to this effect. Judge Liepe seconded the motion. The motion to amend passed with 8 in favor, four opposed, and two abstentions. A vote was then taken on the main motion which resulted in 6 in favor and 7 opposed and one abstention.

A motion was made by Judge McConville, seconded by John Hart, to leave B(3) in ORCP 18. The Chairer suggested that the

matter be considered at the December meeting and no vote was taken on the motion.

Item IIC(1) of memorandum

The Council discussed the comment by Nathan McClintock relating to ORCP 55. No action was taken by the Council.

Item IIC(2) of memorandum

The Council discussed the comment by P. Conover Mickiewicz relating to availability of documents produced by subpoena to all parties. Some Council members suggested that documents should only be available to the requesting party, and pointed out that each party could request its own production by subpoena. After discussion, a motion was made by Maury Holland, seconded by Judge Liepe, to amend ORCP 55 by adopting a new subsection F(3) (set out on page 4 of the memorandum). The motion failed with one in favor, 9 opposed and three abstentions.

The next meeting of the Council will be held on Saturday, December 15, 1990, commencing at 9:30 a.m., in the Oregon State Bar Offices in Lake Oswego.

The meeting adjourned at 12:55 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

B. RULE 18

1. Denny Hubel, Win Calkins, and Lauren Underwood

All three commentators make the same point about the elimination of the statement of claimed noneconomic damages. They suggest that it will lead to many situations where insurance companies will be forced to send an excess letter to an insured because there is no guarantee that noneconomic damages will be less than policy limits. This argument assumes that, if the statement is retained, it actually limits recovery. That certainly is not clear now and language to that effect would be required. The only question I have about the argument is what insurance companies do in the federal system and the majority of the states where the prayer does not in fact limit damages. Do they always send excess letter? If this is a serious problem, why do these other systems not limit recovery to demand?

2. James Hiller

James Hiller's argument for retaining the statement and making it a limit on damages is based upon the original legislative intent in creating 18 B. If the Council does wish to retain the statement, I like Hiller's suggested language making it a limit on recovery. I would change his suggestion slightly as follows:

> Once the statement has been given, it can be amended only upon written leave of the court or stipulation of the adverse party and leave shall be freely given when justice so requires. Upon request of any party, the jury shall be instructed as to the amount of the noneconomic damages claimed and any judgment for noneconomic damages shall not exceed the amount claimed.

This language provides some discretion in the trial judge to avoid the limit by amendment. It also provides a mechanism that inserts the limit into the trial record. Finally, it puts the burden of enforcement of the limitation on the defendant in the form of a requested instruction.

C. RULE 55

1. Nathan McClintock

Nathan McClintock inquired whether the requirement of a 10-day notice to opposing counsel before subpoena of hospital records is clearly spelled out in ORCP 55 H. I think the last sentence of paragraph ORCP 55 H(2)(b) does clearly make this a requirement.

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2. P. Conover Mickiewicz

P. Conover Mickiewicz suggests that the requirement of advance notice to the opposing party is not clear and it also is unclear whether the opposing party has a right to be present at production and inspect and copy what is produced. I think the last sentence of 55 D(1) clearly answers the notice problem. Regarding the second problem, she does have a point. We should add the following as a new subsection F(3):

> F.(3) Books, papers, documents, and tangible things produced. When books, papers, documents or things are produced in response to a subpoena which does not command appearance for deposition or trial, all parties are entitled to be present and inspect and copy any material produced.

3. Denny Hubel

Denny Hubel correctly points out that our health care facility reference in 55 H(1) should be to ORS 442.015(13)(a) through (d) and not to 442.014.

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Council took the following actions concerning the document entitled PROPOSED AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE attached to the original of these minutes (**Exhibit No. 1**). Each tentatively adopted rule was presented by the Chairer for formal promulgation or amendment. The Chairer stated that affirmative votes of 12 Council members were needed to promulgate a rule.

Agenda Item No. 7: Proposed amendment to ORCP 55. This agenda item was discussed at this time due to the fact that one of the witnesses, Bob Neuberger, had to leave to attend a deposition. 7.07

Mr. Neuberger said his concern is the problem under the current system where parties frequently send a notice of deposition and issue a subpoena duces tecum to a non-party which tells the non-party to produce the records and not attend a deposition. He said if the notice and subpoena are issued at the same time, other parties are sometimes not given an opportunity to object before the non-party makes production. He said he would recommend adding the requirement that notice of the subpoena go out 14 days before the subpoena is served on the custodian of records.

The Council then discussed the language in ORCP 55, at page 18 of Exhibit No. 1. Larry Wobbrock testified on behalf of OTLA. A copy of his letter relating to the amendments to ORCP 36 and 55 is attached to these minutes (**Exhibit No. 2**). Regarding ORCP 55, Mr. Wobbrock pointed out that often a subpoena is sent out accompanied by a letter which says that no appearance is necessary and that simply mailing the records is sufficient. He said that is still honored by medical providers. By the time the attorney receives notice that the subpoena has been served, the records have been sent (with no opportunity to object). He said the problem is that the records may have nothing to do with the issue in dispute. Mr. Wobbrock requested that the Council consider requiring that, unless the documents are produced in accordance with the correct procedure, they not be allowed into evidence.

Maurice Holland made the suggestion that "witness" not be used in the phrase "served on the witness".

The Chair suggested that Messrs. Kantor and Wobbrock work out some exact language and report back later at this meeting.

The Chair then asked about Mr. Wobbrock's other concern in his letter (**Exhibit No. 2**) in which he stated, "We submit that a chiropractor should be considered the same as physicians under Rule 44 rather than the same as a hospital under Rule 55." Mr. Wobbrock stated that the reference to "chiropractic facility" in Rule 55 H could be construed as allowing discovery of records of the chiropractor as well as hospital records. Mr. Thorp stated

the reference to chiropractic facility was already in the existing rule and that the requirement that the records be of a licenced facility would prevent any confusion with a chiropractor's or physician's records.

Henry Kantor made a motion that the Council clarify ORCP 44 and 55 to make certain that the production of documents by doctors and chiropractors is covered by ORCP 44 and not ORCP 55. After discussion he modified the motion to ask that the staff comment clearly indicate that the reference to "chiropractic facility" in ORCP 55 H did not mean that records of a chiropractor or physician could be produced according to that section. Mike Starr seconded Henry Kantor's motion. A vote was taken on the motion resulting in 19 in favor and one abstention.

The next item for discussion under the proposed amendments to 55 A and B was a letter from Charles R. Markley (**Exhibit No. 3**). Mr. Markley suggested requiring the litigant who subpoenas documents to provide copies so obtained to all other litigants; he said a specific rule to that effect is needed to prevent ex parte discovery. No action was taken on this suggestion.

Agenda Items No. 4 and 6: Proposed amendment to ORCP 36 and ORCP 46. The Council then discussed the proposed amendments to Rule 36, appearing on page 10 of the packet (**Exhibit No. 1**). They discussed changing the third sentence of B(4)(b) from "may amend the statement" to "may file or amend the statement". A further suggestion was made to say, "... a party may file or amend a statement only by leave of court". This change was unanimously accepted by the Council.

A motion was made by Larry Thorp, seconded by Judge Mattison, to amend 36 B(4)(d) to read: "Except as provided by Rule 44, no other or further discovery of the opinions or qualifications of expert witnesses, or other aspects of expert witness testimony, shall be permitted except upon stipulation between or among disclosing parties." A vote was taken resulting in 14 in favor, 5 opposed, and one abstention.

Maury Holland suggested changing the words "... upon stipulation between or among disclosing parties" in ORCP 36 B(4)(d) to "between or among the parties". After a discussion, a motion was made by Larry Thorp, seconded by Maury Holland, to adopt the language suggested. The motion carried with 13 in favor, 6 opposed, and one abstention. (Bernie Jolles requested that the record show that he abstained.) Justice Graber pointed out that the last sentence in the first paragraph of the comment was incorrect. The Executive Director agreed and said that he would change it.

Bill Gaylord then testified. He objected to the exclusion of a party in 36 B(4)(c). John Hart made a motion, seconded by

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

(for final consideration at 12-15-90 meeting)

EXHIBIT 1 TO MINUTES OF COUNCIL MEETING
HELD 12/15/90

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

Contents

SUMMONS
RULE 7

* * * * *

D. Manner of service.

* * * * *

D(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D(3)(a) **Individuals.**

* * * * *

D(3)(a)(iii) **Incapacitated persons.** Upon an incapacitated person as defined by ORS 126.003(4), by service in the manner specified in subparagraph (i) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B(2).

* * * * *

D(4) **Particular actions involving motor vehicles.**

D(4)(a) **Actions arising out of use of roads, highways, and streets; service by mail.**

D(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf [, except a defendant which is a foreign corporation maintaining a registered agent within this state,] who cannot be

served with summons by any method specified in subsection 7 D(3) of this rule, may be served with summons [by personal service upon the Motor Vehicles Division and mailing by registered or certified mail, return receipt requested, a copy of the summons and complaint to the defendant and the defendant's insurance carrier if known.]

[D(4)(a)(ii) Summons may be served] by leaving one copy of the summons and complaint with a fee of $12.50 in the hands of the Administrator of the Motor Vehicles Division or in the Administrator's office or at any office the Administrator authorizes to accept summons or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles Division by registered or certified mail, return receipt requested. The plaintiff [, as soon as reasonably possible,] shall cause to be mailed by registered or certified mail, return receipt requested, a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, and at the most recent address as shown by the Motor Vehicles Division's driver records, and at any other address of the defendant known to the plaintiff, which might result in actual notice [and to the defendant's insurance carrier if known] to the defendant. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon [such] the date of the first mailing to the defendant.

D(4)(a)[(iii)] (ii) The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D(4)(b) **Notification of change of address.** Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D(4)(c) **Default.** No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail

that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown] unless the plaintiff submits an affidavit showing:

(i) that summons was served as provided in subparagraph D(4)(a)(i) of this rule and all mailings to defendant required by subparagraph D(4)(a)(i) of this rule have been made; and

(ii) either, if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicles Division accessible to plaintiff, that the plaintiff not less than 14 days prior to the application for default caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail, return receipt requested, or that the defendant's insurance carrier is unknown; and

(iii) that service of summons could not be had by any method specified in subsection 7 D(3) of this rule.

* * * * *

D(7) Defendant who cannot be served. A defendant cannot be served with summons by any method specified in subsection 7 D(3) of this rule if the plaintiff attempted service of summons by all of the methods specified in subsection 7 D(3) and was unable to successfully complete service.

COMMENT

The 1973 Legislature substituted the term "incapacitated person" for "incompetent person" in a number of sections of the Oregon Revised Statutes and supplied a definition of the new term which appears in ORS 126.003(4). Some of these former ORS sections are now in the Oregon Rules of Civil Procedure and the Council added a specific reference to the statutory definition to make clear that the definition applies to the ORCP as well as ORS sections.

The Council amendment of ORCP 7 D makes two major changes in motor vehicle service provided by that section: (1) The new language separates the requirements necessary for adequate service of summons from the conditions for securing a default, and (2) service of summons on the Department of Motor Vehicles under ORCP 7 D(4) becomes an alternative form of service which is only available when service cannot be made upon the defendant by any of the methods specified in ORCP 7 D(3).

The first major change was a reaction to Hoyt v. Paulos, 96 Or App 91, 93-94 (1989). In that case, the Oregon Court of Appeals held that delivery of a copy of the summons and complaint to the defendant's insurance company was not part of service of summons for limitation purposes. The new language makes clear that under 7 D(4)(a)(i) the actual service of process only requires service upon the Department of Motor Vehicles and supplementary mailing to the defendant. Presumably this would satisfy the statute of limitations. However, no default is possible under 7 D(4)(c) until 14 days after the defendant takes the added step of mailing to defendant's insurer if one is known or can be identified. The amended language clearly requires the plaintiff to make inquiry of the Department of Motor Vehicles to determine whether their records show an insurer for the defendant. It also allows service on the DMV to be by mail as well as personal delivery to a DMV office. The new language makes clear that if mailing is required to multiple addresses for a defendant, service is complete upon the first mailing.

The second major change reflects some concern regarding the effectiveness of notice to a defendant by service upon the Department of Motor Vehicles. By making such service only available as an alternative to forms of service under ORCP 7 D(3), DMV service when used would be the most reasonable one available under the circumstances. A new subsection, ORCP 7 D(7), makes clear that the plaintiff is only required to show a reasonable effort to use the methods available under ORCP 7 D(3), similar to the showing required for use of 7 D(6), and not the extensive search for defendant required in cases interpreting earlier statutory language such as Ter Har v. Backus, 259 Or 478 (1971). This would not require a defendant to actually attempt all forms of service described in ORCP 7 D(3), only to investigate whether service could be completed by any of those methods.

CLAIMS FOR RELIEF
RULE 18

Claims for relief. A. A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain:

A.(1) A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition.

A.(2) A demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated, except as provided in section B of this rule; relief in the alternative or of several different types may be demanded.

B. (1) The amount sought in a civil action for noneconomic damages, as defined in ORS 18.560, shall not be pleaded in a complaint, counterclaim, cross-claim or third-party claim.

B.(2) The prayer in such actions shall contain only a demand for the payment of damages without specifying the amount.

[B.(3) The party making the claim may supply to any adverse party a statement of the amount claimed for such damages, and shall do so within 10 days of a request for such statement. The request and the statement shall not be made a part of the trial court file.]

COMMENT

The 1987 Legislature provided in ORCP 18 B that noneconomic damages not be pleaded in the complaint. In ORCP 18 B(3), the legislature did require that the party making the claim provide the defendant with a written statement of noneconomic damages claimed. The Council received a number of inquiries whether the statement of noneconomic damages actually limited the amount that could be recovered. The Council felt the simplest way to resolve

the question was to eliminate ORCP 18 B(3). Since the statement was expressly not part of the record in the case, it appeared to have no binding effect limiting damages or controlling the amount of damages actually claimed at trial.

MINOR OR INCAPACITATED PERSONS
RULE 27

* * * * *

A. Appearance of incapacitated person by conservator or guardian. When an incapacitated person as defined by ORS 126.003(4), who has a conservator of such person's estate or a guardian, is a party to any action, the incapacitated person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. If the incapacitated person does not have a conservator of such person's estate or a guardian, the incapacitated person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B(1) When the incapacitated person is plaintiff, upon application of a relative or friend of the incapacitated person.

B(2) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

COMMENT

The 1973 Legislature substituted the term "incapacitated person" for "incompetent person" in a number of sections of the Oregon Revised Statutes and supplied a definition of the new term which appears in ORS 126.003(4). Some of these former ORS sections are now in the Oregon Rules of Civil Procedure and the Council added a specific reference to the statutory definition to

make clear that the definition applies to the ORCP as well as ORS sections.

RULE 36
GENERAL PROVISIONS CONCERNING DISCOVERY

* * * * *

B.(4) **Expert witnesses.**

B.(4)(a) [Upon request of any party, any other party] **All parties** shall [deliver] **serve** a written statement signed by the [other] party or [the other] **that** party's attorney giving the name and business address of any person **that** the [other] party [reasonably expects] **intends** to call as an expert witness at trial and shall disclose in reasonable detail the qualifications of each expert. A party [receiving a request for delivery of such statement] may seek an order limiting disclosure under Section C of this rule.

B.(4)(b) The statement shall be [delivered] **served** not less than [14] **seven** days prior to the commencement of trial. [The court may allow a shorter or longer time.] The statement may be amended without leave of court any time up to [14] **seven** days before trial. Otherwise, a party may amend the statement only by leave of court or by written consent of the adverse party. Leave of court shall be freely given whenever justice so requires.

B.(4)(c) As used in this [section] **subsection**, the term "expert witness" means any person testifying in accordance with ORS 40.410**, except a party**.

B.(4)(d) Except as provided by Rule 44, no other or further discovery of the opinions of expert witnesses shall be permitted except upon stipulation between or among disclosing parties.

* * * * *

COMMENT

At the request of the State Bar Procedure and Practice Committee, the Council reviewed the area of discovery of information relating to expert witnesses. Subsection 36 B(4) is intended to provide an exclusive definition of available discovery of expert witnesses and ORCP 36 B(4)(d) so provides. The rule only allows discovery of the identity and qualifications of a person that a party intends to call as an expert witness. No deposition or further discovery is possible. A court may restrict discovery under ORCP 36, but there is no judicial discretion to allow discovery beyond that provided in the rule. Under paragraph 36 B(4)(c), the requirement of disclosure does not apply to a party who is testifying as an expert.

The requirement of a statement containing the name and qualifications of expert witnesses is automatic. No motion or request is required. The names and qualifications may be served at any time up to seven days before trial. After a statement is served, it may also be amended without leave of court up to seven days before trial. Amendment less than seven days before trial requires consent of adverse parties or leave of the court is required.

Sanctions for failure to disclose names and qualifications of expert witnesses are included with other sanctions in ORCP 46. Since the statement of expert witnesses must be served and filed, a party who lists the names of expert witnesses which that party does not truly expect to call would expose that party to the sanctions specified in ORCP 17.

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

* * * * *

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

COMMENT

See comment to ORCP 55.

RULE 46
FAILURE TO MAKE DISCOVERY; SANCTIONS

* * * *

A.(2) **Motion.** If a party fails to furnish the statement required by Rule 36 B(4), or if a party fails to furnish a report under Rule 44 B or C, or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

* * * *

D. Failure of a party to furnish statement relating to expert witnesses or to attend at own deposition or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy. If a party or an officer, director of managing agent of a party or a person

designated under Rule 39 C(6) or 40 A to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition of that party or person, after being served with a proper notice, or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, or (3) to furnish the statement required by Rule 36 B(4), the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among other it may take any action authorized under paragraphs (a), (b), and (c) of subsection B(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

COMMENT

ORCP 46 A(2) and 46 D were amended to provide sanctions for failure to furnish names and qualifications of persons that a party expects to call as expert as required by ORCP 36 B(4). The opposing party may either seek to force the opponent to comply with the requirements of ORCP 36 B(4), by securing an order to that effect under 46 A(2), or seek sanctions listed in ORCP 46 B. At the discretion of the trial judge, the sanctions available under ORCP 46 B could include preventing the undisclosed expert witness from testifying.

SUBPOENA
RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and may require[s] the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. [It also] A subpoena requiring attendance to testify as a witness requires that the witness remain [till] until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For production of [documentary evidence] books, papers, documents, or tangible things and to permit inspection. A subpoena may [also] command the person to whom it is directed to produce and permit inspection and copying of designated [the] books, papers, documents, or tangible things [designed therein; but] in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection

and copying of designated books, papers, documents or tangible things but not commanded to also appear for deposition, hearing or trial, may within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents or tangible things the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance.

C(1) **By whom issued.** A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance

of a person, to produce books, papers, documents or tangible things and to permit inspection thereof: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

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

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

D(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other

person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). **Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, shall be served on each party 14 days before the time designated for production, unless the court orders a shorter period.**

D(2) **Service on law enforcement agency.**

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena

may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

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

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

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

D(3)(b) The attorney, or the attorney's agent, made

arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

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

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

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

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

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

F(1) **Subpoena for taking deposition.** Proof of service of a

notice to take a deposition as provided in Rules 39 C and 40 A, or of notice of subpoena to command production of books, papers, documents, or tangible things before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. [The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 36 B, but in that event the subpoena will be subject to the provisions of Rule 36 C and section B of this rule.]

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

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be

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

H. Hospital records.

H(1) **Hospital.** As used in this section, unless the context requires otherwise, "hospital" means a [hospital] **health care facility defined in ORS 442.015(13)(a) through (d) and** licensed under ORS 441.015 through [441.087, 441.525 through 441.595, 441.815, 441.820, 441.990, and 442.342 through 442.450] **441.097 and community health programs established under ORS 430.610 through 430.700.**

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

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five

days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than [ten] 14 days prior to service of the subpoena on the hospital.

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the

custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule.

H(3) **Affidavit of custodian of records.**

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state

in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) **Personal attendance of custodian of records may be required.**

H(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to

the contrary.

COMMENT

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

The subpoena must be served on each party 14 days before the required time for production. The non-party subject to such subpoena may either secure a court order to control production or simply file objections to the requested production. If objections to production are filed, the party seeking production is required to secure a court order before any production is allowed. Service by mail would not be allowed for a non-deposition subpoena for production. A non-deposition subpoena also cannot be used to force a non-party to allow entry upon land.

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

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 15, 1990

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

* * * * *

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

COMMENT

See comment to ORCP 55.

SUBPOENA
RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and **may** require[s] the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned **or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place.** [It also] **A subpoena requiring attendance to testify as a witness** requires that the witness remain [till] **until** the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For production of [documentary evidence] books, papers, documents, or tangible things and to permit inspection. A subpoena may [also] command the person to whom it is directed to produce **and permit inspection and copying of designated** [the] books, papers, documents, or tangible things [designated therein; but] **in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection**

and copying of designated books, papers, documents or tangible things but not commanded to also appear for deposition, hearing or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents or tangible things the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance.

C.(1) **By whom issued.** A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the

attendance of a person, to produce books, papers, documents or tangible things and to permit inspection thereof: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C., or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

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

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

D.(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other

person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C.(6), shall be served in the same manner as provided for service of summons in Rule 7 D.(3)(b)(i), D.(3)(d), D.(3)(e), or D.(3)(f). **Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.**

D.(2) **Service on law enforcement agency.**

D.(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of

the law enforcement agency.

D.(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D.(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D.(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

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

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

D.(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent,

has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

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

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

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

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

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

F. Subpoena for taking depositions or requiring production

of books, papers, documents, or tangible things; place of production and examination.

F.(1) **Subpoena for taking deposition.** Proof of service of a notice to take a deposition as provided in Rules 39 **C.** and 40 **A.**, **or of notice of subpoena to command production of books, papers, documents, or tangible things before trial as provided in subsection D.(1) of this rule** or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. [The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 36 **B.**, but in that event the subpoena will be subject to the provisions of Rule 36 **C.** and section **B.** of this rule.]

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

an order of court.

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

H. Hospital records.

H.(1) **Hospital.** As used in this section, unless the context requires otherwise, "hospital" means a [hospital] **health care facility defined in ORS 442.015(13)(a) through (d) and** licensed under ORS 441.015 through [441.087, 441.525 through 441.595, 441.815, 441.820, 441.990, and 442.342 through 442.450] **441.097 and community health programs established under ORS 430.610 through 430.700.**

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

H.(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of

a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than [ten] <u>14</u> days prior to service of the subpoena on the hospital.

H.(2)(c) After filing and after giving reasonable notice in

writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H.(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D. of this rule.

H.(3) **Affidavit of custodian of records.**

H.(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time

of the act, condition, or event described or referred to therein.

H.(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H.(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H.(4) **Personal attendance of custodian of records may be required.**

H.(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H.(5) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

COMMENT

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

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

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

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

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

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

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

NEW BUSINESS

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

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

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

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

Note

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

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December 4, 1991

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

Re: Council on Court Procedures

Dear Fred:

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

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

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

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

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

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

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

Sincerely,

Karen K. Creason

KKC:jb

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

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

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

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

Note

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

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

STOEL RIVES BOLEY JONES & GREY

MEMORANDUM

January 28, 1992

TO: FRED MERRILL
COUNCIL ON COURT PROCEDURES

FROM: KAREN K. CREASON

RE: Rule 55: Discovery of Hospital Records

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

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

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

within 5H to clearly state, contrary to provisions of Section F, that hospital records cannot be subpoenaed for production without a related trial, hearing or deposition to provide the presiding officer to take charge of the sealed records; and (3) to clarify the provisions concerning the circumstances under which the sealed records may be opened, in a way which continues to allow hospitals to send the sealed records into the judicial system in an economical way and assures that they are opened and released by the judicial recipient only under proper circumstances.

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

Karen K. Creason

cc: Mr. Dan Field, Oregon Association of Hospitals

D.(1) Service. .....Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, if permitted under paragraph H of this rule, shall be served . . .

F.(2) Place of examination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, or tangible things, if permitted under Section H of this rule, only in the county ....A nonresident of this state who is not a party to the action may be required by subpoena to attend or to produce books, papers, documents or tangible things, if permitted under section H of this rule, only in the county ... .

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

H.(2) Certification in lieu of appearance:

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

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

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

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

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

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

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

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

H (3) Personal attendance of custodian . . .

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

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

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

H(4). Tender and payment . . .

McConville to insert "persons" between "Those" and "described" at the beginning of the underlined language in 39 E. It was also decided after discussion that the word "applications" in the underlined language in 46 A(1) should be changed to "application".

The motion as amended passed with 18 in favor and one opposed.

Agenda Item No. 8: Revised meeting schedule (Chair). This agenda item was discussed under Agenda Item No. 5 above.

The Council then returned to the discussion of the proposed amendments to Rule 55 (**Agenda No. 6**) regarding subpoenas without trial or deposition and hospital records. The Chair asked Dennis Hubel if the Bar's Procedure & Practice Committee had dealt with that issue. Mr. Hubel said that they had been attempting to make the procedures in 55 F and 55 H more alike rather than less alike, that they had learned of the concerns of Karen Creason and the Oregon Hospital Association, and that they had just recently seen the Executive Director's 3-12-92 memorandum but had not had an opportunity to discuss it. He said the Bar's committee felt that the amendments to Rule 55 promulgated in the 1989-91 biennium dealt with the problem adequately.

The Chair asked Dennis Hubel and Charlie Williamson to circulate the Executive Director's 3-12-92 memo to OADC and OTLA, respectively. The Chair also asked Maury Holland to contact the people identified in the attachments to the agenda for this meeting, including Larry Thorp. The Chair stated that a report from the Bar's committee would be very much appreciated for the June 13 meeting in Ashland.

The Council then returned to **Agenda Item No. 4**, six-person juries (see attached report from Judge Barron). Dennis Hubel said that the Bar's committee had just voted on the six-person jury issue and the result was unanimous opposition on the part of plaintiffs' lawyers and defense lawyers and family practitioners and that the committee was in the process of drafting a proposal to the Council. He said their concern was the Los Angeles study indicating that minority participation in a six-person jury might be affected, particularly in light of the recent current events in Los Angeles as a result of the Rodney King verdict. Referring to Judge Barron's memo, he thought that the reduction of civil jury trials during the period 1982 to 1991 was very significant and that it would result in far greater savings to the system than reducing the number of jurors. He felt the emphasis should continue to be on alternative dispute resolutions, settlement conferences, etc., rather than changing the number of jurors.

Judge Barron said that he thought Rule 56 should be changed to reflect that there cannot be less than six jurors since the

March 12, 1992

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

FROM: **Fred Merrill, Executive Director**

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

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

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

SUBPOENA
RULE 55

* * * *

H. Hospital records.

* * * *

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

H.(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i)

if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business[; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena]. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than 14 days prior to service of the subpoena on the hospital.

← NOTE BRACKETS

* * * *

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

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

H.(4)[(a)](b) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)[(b)](c) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

* * * *

FRM:gh

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of June 13, 1992

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

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

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

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

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

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

Note

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

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

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

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

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

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

Minutes submitted by
Gilma J. Henthorne

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

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

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

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

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

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

excluded from the deposition." The Chair pointed out the problem in defining who the party is when a corporate defendant is involved.

After a lengthy discussion, the Council decided to include the proposed amendment to Rule 39 in the packet for publication in the Advance Sheets.

The Council recessed for lunch at 12:20 p.m. and resumed the meeting at 12:55 p.m.

Agenda Item No. 6: Secrecy in personal injury actions - Rule 36 C.(2) (Chair) (see attached proposed amendment). The Chair explained that the attached proposed amendment was part of Senate Bill 579 in the last legislative session with some of Susan Graber's comments. It had initially come about as a result of the concern of Mr. Larry Wobbrock and other members of the bar with reference to product liability cases. The Chair then asked for public comment.

Mr. Michael Williams, Portland, spoke on behalf of the Oregon Trial Lawyers Association as well as clients. He felt that the proposal codifies what Multnomah County judges are currently doing every time the issue is litigated and that the benefit of having it in the rule book would avoid having to file motions every time to get the same ruling. He stated that it would save litigation expenses for injured victims.

Lee Johnson questioned whether there would be any objection to changing "client" to "party". A discussion followed with different views.

Mr. Paul Fortino, Portland, a member of the Executive Board of the Oregon Association of Defense Counsel, stated that he had been asked to advise the Council that the OADC opposes provisions that would shift the burden of maintaining the secrecy of information in sealed filings to the party claiming confidentiality. Mr. Fortino then summarized his reasons that militate against shifting the burden (set forth in his June 12, 1992 letter to the Chair - attached).

Susan Graber wondered whether, from Mr. Fortino's reading of the proposal, parties could not stipulate as part of a stipulated protective order that they would not make a request for further disclosure, i.e. could not that be part of a stipulation -- that not only do we keep this secret but we will not ask to reopen the question. Mr. Fortino responded that if the proposal were adopted, he would try to do that.

Mr. Charles Tauman, Portland, speaking on behalf of himself and the Oregon Trial Lawyers Association, commented on the burden of allocation of the burden of proof; he felt that the burden of

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July 30, 1992

VIA FACSIMILE AND REGULAR MAIL

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

Re: Council on Court Procedures 6-13 Meeting

Dear Mr. Kantor:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

DENNIS JAMES HUBEL

DJH:sb

cc: Karen Creason
Stephen Thompson
Maurice J. Holland

been shown as a sentence to be added. The addition of the sentence had been tentatively approved by the Council at its May meeting, although she had not approved its addition because it did not accomplish the desired effect (i.e., it did not specify the standard for exclusion from a deposition). After discussion, the Council voted unanimously to not approve the addition of the sentence, "At the request of a party or a witness, the court may order persons excluded from the deposition," to Rule 39 D.

Bruce Hamlin pointed out that in the materials setting forth proposed amendments the deletions and additions in Rule 32 are keyed to the language in the original ad hoc group proposals, not to the language of existing Rule 32. The Executive Director responded that the necessary corrections would be made in the final and official version of amendments as approved and promulgated.

Agenda Item No. 12: Future meeting schedule. The Chair announced that the Council would not meet in January of 1993, but would probably meet at the Bar Center on the first Saturday in February and again on the third Saturday in March, not to conflict with Easter break.

Agenda Item No. 13: NEW BUSINESS. In response to a question from the Chair, John Hart said that his Task Force on subpoenaing of hospital records pursuant to Rule 55 had no report, but could use one additional member from the Council. David Kenagy expressed willingness to be added to this Task Force and was appointed. The Chair suggested that at a coming meeting in the spring it might be useful to continue discussion concerning the handling of Staff Comments in light of the Council's Rules of Procedure, copies of which he asked be provided to any members who might not be familiar with them. Bernie Jolles moved a vote of thanks and commendation to Maury Holland for hard work in connection with the Rule 32 amendments, which was seconded and carried by a round of exhausted applause.

Note

There being no further new business, the meeting was adjourned at 3:00 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

from doing this despite occasional requests that he do so. The Chair suggested that Holland notify each members whose term is expiring of that fact, along with whether he or she is eligible for reappointment. Holland said that, in addition to that, he would follow past practice and, during the summer, notify each of the appointing authorities by letter of any vacant positions which they are respectively authorized to fill. He added that he would like to be further advised on whether such letters should mention the possibility of reappointment where pertinent.

David Kenagy responded to an inquiry from the Chair to the effect that there was as yet nothing new to report from the committee appointed to study possible amendments to R. 55, particularly concerning subpoenaing of hospital records.

There being no further new business, the meeting was adjourned at 12:05 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

Maurice J. Holland
Executive Director

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

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July 1, 1994

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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

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July 5, 1994

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Maury Holland, Executive Dir.
Council on Court Procedures
University of Oregon Law School
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Re: Council on Court Procedures

Gentlemen:

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

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

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

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

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

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

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

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

> Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

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

> Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all of the records [described in] **responsive to** the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

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

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July 11, 1994

Maury Holland
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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

Acknowledged 7/11/94

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July 7, 1994

Maury Holland
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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

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July 11, 1994

Maury Holland
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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

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

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August 3, 1994

Mr. Maury Holland
University of Oregon
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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

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August 9, 1994

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Council On Court Procedures
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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

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July 7, 1994

Maury Holland
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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

Proposed amendments by OSB Practice & Procedure Committee: Labeled in the margin as "P&PC"

Proposed amendments by Council on Court Procedures: Labeled in the margin as "CCP"

SUBPOENA
RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For production of books, papers, documents, or tangible things and to permit inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody, or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things but not commanded to also appear for deposition, hearing, or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents, or tangible things, the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is reasonable and oppressive or (2) condition denial of the motion upon the

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. #1 P&PC

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

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

D(2) **Service on law enforcement agency.**

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(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.~~ #4 P&PC

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. #5 P&PC

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 otherwrise, at a time and place specified in the subpoena. #6 P&PC

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.

#7 P&PC →

H(2) **Mode of compliance.** Hospital records may be only obtained by subpoena duces tecum only as provided in this section~~;~~. However, if disclosure of such requested records is restricted ~~by~~ or otherwise limited by state or federal law, ~~the requirements of such law must be met~~ such protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law protecting such records have been complied with, and such compliance is evidenced through an appropriate court order or execution of an appropriate consent by the patient. Absent such court order or consent, production of records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate court order or consent by the patient does accompany the subpoena, then #8 CCP

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

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records ~~described in~~ responsive to the subpoena within five days after receipt thereof Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction. #9 CCP

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, 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. #10 P&PC

H(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 subpart H(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. #11 P&PC

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. #11 P&PC (cont'd)

H(2)(b)(2) Unless good cause is shown therefor, the hospital will not be required to respond to subpoenas 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 record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule.

H(3) Affidavit of custodian of records.

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records ~~described in~~ responsive to the subpoena; (iii) that the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein. #12 CCP

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) **Personal attendance of custodian of records may be required.**

H(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge, unless there has been agreement to the contrary.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

#1 P&PC (cont'd)

C. Issuance.

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

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

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

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

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

#2 P&PC

served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Copies of each subpoena commanding production of books, papers, documents, or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, shall be served on each party at least ~~seven~~ 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.

#3 P&PC

D(2) Service on law enforcement agency.

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this

manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

D(3) Service by mail.

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

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

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

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

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

#4 P&PC NO

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.

#5 P&PC YES

F(3) Production without examination or deposition. Notwithstanding ORCP 7(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.

#6 P&PC NO

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.

NO #7 P&PC

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

#8 OCP

YES - BUT CHAN

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.

#8 CCP (cont'd)

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records ~~described in~~ responsive to the subpoena within five days after receipt thereof Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

#9 CCP

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition

or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, 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.

#10 P&PC

H(2)(b)(i) 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 subpart H(2)(b)(i)(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.

#11 P&PC

H(2)(b)(ii)(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 subpoenas 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.

#11 P&PC (cont'd)

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule.

H(3) Affidavit of custodian of records.

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following:

(i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records ~~deseribed in~~ responsive to the subpoena; (iii) that the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

#12 CCP

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) Personal attendance of custodian of records may be required.

H(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge, unless there has been agreement to the contrary.

3. Rule 32 is amended to make clear that the claim form procedure mandated by subsection 32 F(2) is applicable only to class actions in which the relief sought consists of individual monetary recoveries on behalf of class members. This amendment reinforces the purpose of this procedure, which is to ensure that class actions may not be used to generate so-called fluid recoveries which, in some other jurisdictions, have been paid to groups or organizations which have sustained no legally cognizable harm.

4. Rule 55 is amended in an effort to make the sometimes cumbersome process of subpoenaing hospital records, which frequently occurs in personal injury litigation, less confusing both for attorneys and for hospitals. It is also amended to provide, for the first time in Oregon practice apart from hospital records, that records and documents subpoenaed from persons who are not parties to the litigation may be provided by mail, rather than solely by the traditional method of allowing their inspection and copying. The new optional method of compliance should save litigants much of the expense that has been entailed by the traditional method of complying with document subpoenas. Another amendment to this rule provides more satisfactory compensation for the time and trouble imposed upon persons who are not themselves parties to a particular litigation, but who are nonetheless required to furnish documents, records, or the like.

5. Rule 57 is amended to make clear that trial judges have broad discretion to regulate the process of voir dire, by which jurors are selected, so that it is handled efficiently and without undue consumption of time. This amendment is intended to negate any contention by attorneys that the trial judge is obligated to permit examination of prospective jurors on an individual basis, but at the same time does not preclude a judge from permitting, or even directing, that such method be used when circumstances make it appropriate.

6. Rules 58 and 69 are amended by transferring from the latter to the former a provision making clear that when a party who has entered an appearance fails to show up for trial, the judge may proceed with the trial as scheduled unless there is good reason not to do so. This provision should save time and cost, especially in jury trials.

I should add that the Council devoted a good deal of time and thought to considering proposals to amend the ORCP that, while possessed of some merit, were ultimately not approved for promulgation, largely because they carried some risk of lengthening or complicating civil litigation, thereby adding to

SUBPOENA
RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For production of books, papers, documents, or tangible things and to permit inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody, or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection

of a person, to produce books, papers, documents, or tangible things and to permit inspection thereof: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

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

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

D(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other

person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, whether or not personal attendance is required, ~~for~~ one day's attendance fees. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Copies of each subpoena commanding production of books, papers, documents, or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, whether the subpoena is served personally or by mail, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

D(2) **Service on law enforcement agency.**

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the

designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

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

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

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

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

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

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

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

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

deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

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

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

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

F(3) **Production without examination or deposition.** A party who issues a subpoena may command the person to whom it is

issued, other than a hospital, to produce books, papers, documents, or tangible things by mail or otherwise, at a time and place specified in the subpoena, without commanding inspection of the originals or a deposition. In such instances, the person to whom the subpoena is directed complies if the person produces copies of the specified items in the specified manner and certifies that the copies are true copies of all the items responsive to the subpoena or, if all items are not included, why they are not.

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

H. Hospital records.

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

H(2) **Mode of compliance.** Hospital records may be obtained by subpoena [~~duces tecum~~] only as provided in this section[~~,~~]. However, if disclosure of [~~such~~] any requested records is

restricted [~~by~~] or otherwise limited by state or federal law [~~the requirements of such law must be met.~~], then the protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law have been complied with and such compliance is evidenced through an appropriate court order or through execution of an appropriate consent. Absent such consent or court order, production of the requested records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate consent or court order does accompany the subpoena, then production of all records requested shall be considered production of the records responsive to the subpoena.

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena [~~duces tecum~~] is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records [~~described in~~] responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and

number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with [~~this~~] subparagraph H(2)(b)(iv), then a copy of the subpoena shall be served on the [~~injured party~~] person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the hospital.

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the

presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule.

H(3) **Affidavit of custodian of records.**

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records [~~described in~~] responsive to the subpoena; (iii) that the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the

facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) **Personal attendance of custodian of records may be required.**

H(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge, unless there has been agreement to the contrary.

COMMENT TO RULE 55

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

This subsection is also amended to make clear that copies of subpoenas commanding production of books, documents, papers or tangible things before trial must be served upon all other parties within the prescribed time, whether such subpoenas are served personally or, as permitted by renumbered subsection 55 D(3), by mail.

55 D(3) is renumbered.

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

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

55 F(3) is added to provide that a subpoena commanding production of books, papers, documents or tangible things without a personal appearance by the person subpoenaed may, at the option of the party issuing the subpoena, specify that production shall be either by permitting inspection and copying of originals or by mailing certified true copies of the requested items to the address shown in the subpoena. The purpose of this amendment is to save the time and expense often entailed by traveling to the subpoenaed person's county of residence or place of business for inspection and copying of originals when the party issuing the subpoena believes that mailing of certified copies will suffice. The Council's intent is that the place from which copies are mailed be deemed the place where they are produced for purposes of subsection F(2) of this rule.

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

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

The amended language of the second, third and fourth sentence of this subsection is intended to accomplish two purposes. The first is more fully to alert parties subpoenaing hospital records that some of them are prohibited by federal or state privacy regulations from being disclosed absent an appropriate consent or court order. When necessary and obtainable, such consent or court order should accompany service of the subpoena. Unless a consent or court order accompanies service, a hospital will frequently be prohibited by state or federal regulations, not only from producing copies of requested records, but from even disclosing the existence of such records or that they are in its custody.

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

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

55 H(2)(b) is amended to clarify which subparagraph is referenced in the fourth sentence, and to provide that copies of hospital records subpoenas must be served upon all parties, as well as upon the person who is the subject of the records, who might not be an "injured party" as so described in the prior language of this paragraph.

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

incorporation of the LAC rules as Rule II D. The floor was then opened for comments and discussion.

Mr. McMillan questioned the practice of electing the public member as Treasurer, because he doubted whether the public member should chair a Council meeting in the absence of the Chair and Vice Chair. Justice Durham stated that he found some inconsistency between the second and third sentences of revised Rule II A, in that the former provides, consistently with the statute, that the Chair, along with other officers, be elected annually, while the latter seems to codify an intent that, in effect, they are elected biennially. Justice Durham, seconded by Judge Marcus, then moved that the revised Rules of Procedure be adopted as proposed, with the single exception that the third sentence of Rule II A: "It is the intent of the Council that each of the officers will be elected to two consecutive terms, and that the Vice Chair will succeed the Chair in office," be deleted. This motion was carried by a vote of 12 in favor, 1 opposed, and no abstentions.

Agenda Item 4: Possible problem re ORCP 55 I (see Attachment B to agenda of this meeting) (Prof. Holland). Prof. Holland briefly summarized the phone call he had received from Messrs. Walsh and Wiswall, of Eugene, concerning what they perceived to be some problems created by ORCP 55 I, enacted by the 1995 legislature with no consultation with the Council. He also noted that copies of a letter from Mr. Walsh, dated May 1, 1996, further explaining those problems, had been distributed at the meeting (copy attached to these minutes).

Mr. Gaylord said he thought that Messrs. Walsh and Wiswall were raising two distinct, though somewhat related, problems. The first problem had to do directly with ORCP 55 I and its possible practical effect of overriding the physician-patient privilege, and the second had to do with the asserted overbreadth of medical records subpoenas.

Mr. Gaylord then asked whether anyone wished to comment on these issues. Mr. Hart mentioned that the issue of the scope of medical records subpoenas is now working its way through the appellate courts. Mr. Gaylord noted that there was now a subcommittee charged with studying ORCP 55 I, and asked that Ms. Craine, as its Chair, be made aware of the issue, which Mr. Hart said he would do as a member of the subcommittee. Justice Durham commented that a possible defect in ORCP 55 I is in failing to distinguish between validity of service of a subpoena as opposed to its substantive effectiveness to abrogate a privilege with respect to materials subpoenaed.

Ms. Karen Garst, Executive Director of the Oregon State Bar, was then recognized by the Chair and asked whether sponsors of legislation of this kind would typically involve the Bar in their efforts. Ms. Garst replied that the Bar has several mechanisms through which other organizations can coordinate with it respecting legislative reform, such as the Government Relations Program and Law Improvement Section, but noted that of course this kind of coordination is not legally required. Mr. McMillan observed that coordination with the Bar, or with the Council when an issue involved the ORCP, would seemingly improve the chances of the final product being workable. Mr. Hamlin expressed the view that, had ORCP 55 I been referred to the Council for its input, the problems reportedly being encountered with it almost certainly would have been avoided. This discussion concluded with general agreement that any further consideration of these issues by the Council should await a report from Ms. Craine's subcommittee.

Agenda Item 5: Status report of ORCP 7 subcommittee (see Attachment C to agenda of this meeting) (Mr. Rasmussen). Mr. Rasmussen reported that this subcommittee had recently conducted a telecon, would soon be conducting another one, and was working very hard to draft some well considered proposed amendments to ORCP 7. He asked members to take a look at the various drafts and comments contained in Attachment C, and let the subcommittee know of any comments or suggestions they might have. Mr. Hart commented that he thought there exists greater clarity concerning proper service of summons at the present than at any other time in his experience.

Agenda Item 6: Report of subcommittee to review ORCP 17 and 54 E (see Attachment B to 12/9/95 agenda) (Ms. Tauman). In the absence of Ms. Tauman, Judge Brockley reported that this subcommittee had met once by telecon, was continuing its work, and expected to have a report by the next meeting of the Council.

Agenda Item 7: Continuation of review of 1995 legislation affecting civil practice apart from statutes amending the ORCP (see Attachment B to 12/9/95 agenda) (Mr. Gaylord). Mr. Gaylord stated that he saw no problems from the Council's perspective created by H.B. 2625, but saw some possible problems in connection with the prevailing party fee provisions of S.B. 385. Mr. Lachenmeier commented that, while the Council has no authority to tinker with this or any other legislation, it might be worthwhile for it to give some thought to whether the prevailing party fee provisions of this statute dovetail with existing sanctions provisions of the ORCP. It was agreed that the subcommittee chaired by Ms. Tauman, which has already been asked to study ORCP 17, should also be asked to give some preliminary thought to the issue raised by Mr. Lachenmeier, and

Attachment B to Agenda of 5-11-96 Meeting

April 29, 1996

To: Chair and Members, Council on Court Procedures

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

Re: Possible Problems with ORCP 55 I as Added by 1995 Legislature

On April 26 I had a phone conversation with Eugene attorneys Jim Walsh and William Wiswall, by the conclusion of which I gained a better understanding of a possible "problem" with 55 I that had been mentioned to the Council by Rudy Lachenmeier two or three meetings ago. That problem appears to be that some attorneys, and perhaps some trial judges, are intrepreting 55 I as, of its own force, effecting a waiver of the physician-patient privilege.

I failed to understand how this could be so until Messrs. Walsh and Wiswall pointed out what should have apparent from my first glance at this new section, namely, that provided only that a copy of a subpoena for medical records is served on the patient, the health care recipient, or his or her attorney if there is one, at least 24 hours prior to its being served on the records custodian, then the service is "valid" Not suprisingly, "valid" is apparently being widely interpreted to mean that the records must be produced--what else could it mean?--regardless of whether any privilege has been actually waived by the patient.

The drafters of 55 I must have believed that a physician or health care facility being served with such a subpoena could properly presume waiver of the privilege from the mere fact that, 24 hours prior to service on him, her, or it, the patient or health care recipient had gotten notice of the subpoena by service of a true copy, and hence, theoretically, had an opportunity to assert any privilege. Realistically, 24 hours is not enough of a lead time from which fairly to infer waiver by failure to object. That is especially so in light of the fact that, under 55 I, if the patient or health care recipient has an attorney, the effective date of advance service would be the date of mailing of the copy of the subpoena to the attorney, who might not actually receive it until 3 or 4 days later, by which time service of the subpoena itself, and perhaps even compliance with it, might already have occurred. Given the possible breadth of medical records subpoenas, Messrs. Wiswall and Walsh believe that some serious privacy issues might well be posed by 55 I, over and above garden variety discovery problems.

In an earlier phone conversation I had with Mr. Tom Cooney, general counsel for the OMA, who had a substantial role in

getting 55 I enacted in the '95 session, he told me that it was no part of the purpose of 55 I to weaken or abridge the physician-patient privilege, or to create a new method of waiver. If anything, he said, 55 I was intended to give greater practical protection to the privilege. Mr.Cooley added that the problem to which 55 I was intended to respond was that of physicians being served with patient record subpoenas, sometimes under pressure to comply in far less time than the 14 days allowed, but with no assurance that the patient had, or was willing to, waive the privilege. This imposed on physicians the burden of trying to contact patients or their attorneys, to learn whether the privilege had already been waived in the course of litigation or, if not, whether the patient was willing to waive the privilege in response to the subpoena. The premise of this must have been that certification accompanying service of a patient records subpoena that a copy thereof of had been served at least 24 hours earlier on the patient or his or her attorney would, assuming no objection or protest by the time the subpoena is served, constitute a form of waiver of the privilege which physicians and other health care providers could rely upon.

I told Messrs. Wiswall and Walsh that I would bring this issue to the Council's attention as promptly as possible, because if the problem is as serious as they believe it to be, the Council should probably discuss as early as its May 11 meeting whether and how to proceed. As a matter of its technical authority, since 55 I would seem clearly to be a matter of "practice and procedure," the Council has the statutory power to deal with any problem it perceives by simply promulgating a curative amendment in its usual fashion, if it can reach agreement on what such an amendment should provide.

However, 55 I was enacted by the 1995 legislature, a circumstance that presumably warrants an extra measure of caution. The Council might therefore decide that the more prudent course, perhaps after some consultation with the Mr.Cooney, would be to recommend to the OSB that it seek enactment of legislation to fix whatever is wrong with 55 I. Proceeding in that manner would have the Council drafting an appropriate amendment to 55 I for forwarding to the OSB Procedure and Practice Committee, which would, assuming approval by that committee, then send it up the line for official approval by the Board of Governors. At this point I do not know, but will try to find out as soon as possible, whether perchance this matter has already been called to the attention of the Procedure and Practice Committee. I doubt whether this has happened, since if it had, I'd guess that committee would already have been in contact with the Council.

On the other hand, an alternative way to proceed might be to prepare a proposed amendment for forwarding directly to Sen. Neil Bryant, Chair of the Senate Judiciary Committee. As you might recall, Sen. Bryant invited the Council, by letter to Bill Gaylord, to send him proposed legislation it deems necessary to deal with any problems created by any 1995 session legislation

related to the ORCP so that, subject to his agreement with it of course, he could prefile an appropriate bill. This might be a good opportunity to illustrate to legislators the possible downside of their short-circuiting the Council when dealing with the ORCP, though without much hope that this would prompt them to swear off the practice.

cc: Ms. Susan Evans Grabe
Mr. Jim Walsh
Mr. William Wiswall

Wiswall
&Walsh,
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May 1, 1996

Professor Maurice Holland
Executive Director-Council on Court Procedures
1221 University Of Oregon
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Re: ORCP 55(I)

Dear Professor Holland:

Thank you for taking the time to speak with myself and Bill Wiswall concerning the newly adopted ORCP 55(I). This section has created a number of problems for practitioners. It appears to largely do away with the physician-patient privilege with respect to parties in litigation.

We perceive this section as being poorly written. It provides for a 24 hour notice to the party's attorney prior to service of the subpoena, but as a practical matter that may not be enough time in which to object and/or move for an order from the Court to quash the subpoena. Additionally, the section does not provide a method for challenging the intended action. It may lull both the attorney receiving the notice copy and the doctor into a false sense of security. If the rule does not abrogate the physician-patient privilege then the patient's attorney should advise the doctor that the privilege is not waived and instruct them not to produce the records as requested. The doctor should in all cases insure that there is a valid waiver of the privilege or a consent to disclosure. If the physician receiving the subpoena relies on the patient's attorney to give them advice or to direct a particular course of action it could be that both the physician and the attorney end up in a malpractice situation when the patient does not consent to disclosure.

It seems that this is an appropriate time to review the nature of the physician-patient privilege in Oregon and I realize this is a matter beyond the scope of your council's authority. I believe we need to determine whether a party in litigation is required to disclose any medical records requested by the other side. In many of our personal injury cases we object to the production of unrelated medical records. Usually the other side will file a motion to compel production and the court almost always rules in favor of production. Some judges have taken the view that a plaintiff's life becomes an open book

involved in litigation. I believe that is an attitude shared by many judges around the state. An order compelling production does not require the court to conduct an in-camera review of the records and the court obviously wants to avoid that time consuming process.

We currently represent a number of individuals with deeply personal matters contained in their medical records. In one case, the adverse attorney subpoenaed records from a doctor's office and learned that our client had contracted a sexually transmitted disease from her husband. The adverse attorney also subpoenaed records relating to a breast augmentation surgery that had occurred prior to the accident and although he requested a copy of the entire file, the physician declined to send copies of the before and after photographs.

I could give you other examples to show how the production of unrelated medical records invades the privacy rights of litigants. I believe it is reasonable for persons in litigation to expect some privacy. ORCP 55I tends to eliminate any reasonable expectation of privacy. I would urge that the counsel review this section as soon as possible and recommend it's revision or elimination in the next legislative session. I also believe that the counsel should be in communication with the practice and procedure committee of the Oregon State Bar to discuss the inter-relationship between the ORCP and the Rules of Evidence as they relate to the physician-patient privilege. It may be appropriate to have the legislature look at some of the relevant provisions regarding medical records contained in other statutes. ORCP 55I is a vast expansion of the "hospital records" provision contained in ORCP 55H. It was not well thought out and a number of problems are sure to result from the enactment of this provision.

Very truly yours,

WISWALL & WALSH, P.C.

James K. Walsh

JW/ks

cc: Gilma Henthorne

possible application of ORCP 62. Upon a call of the question, the motion was agreed to by a vote of 7 in favor, 5 opposed and 2 abstaining.

Mr. Gaylord then asked how many members would favor the Council giving more comprehensive consideration to broader issues that might be posed by ORCP 68 C(4)(c)(ii), and pointed out that anyone can place an item on the agenda. Eleven of the 14 members present indicated that they favored the Council doing this. Judge Brockley requested that, if the broader issues are to be revisited, the topic be scheduled for a single specific time. Mr. Alexander suggested that it might be helpful if the minutes of discussions concerning this topic during the previous biennium were distributed to all members, with which there was general agreement, and Prof. Holland said he would see that this was done.

Agenda Item 4: Report of subcommittee to review 1995 legislative amendments to ORCP 17 and 54 E (see Attachment B to 12-9-95 agenda) (Ms. Tauman). In the absence of Ms. Tauman, Mr. Alexander reported on behalf of the subcommittee that there had been some discussion among its members concerning ORCP 54 E as amended, and the conclusion reached that this section did not present any problems requiring the Council's attention. He added that the subcommittee had not yet completed its review of ORCP 17 D.

Agenda Item 5: Report of subcommittee to review ORCP 55 I (see Attachment B to 12-9-95 agenda and Attachment B to 5-11-96 agenda) (Ms. Craine). Mr. Gaylord read and placed in the record Ms. Craine's letter of June 7 confirming that, in the subcommittee's view, the insertion of ORCP 55 I by the '95 legislature appears to have created "some serious practical problems." (A copy of this letter is attached to the file copy of these minutes.) Mr. Gaylord stated that the Council's best course of action would be to defer further consideration of this item pending a full report from the subcommittee.

note

Agenda Item 6: Conclusion of review of 1995 legislation: S.B. 601, H.B. 3098 (see Attachment B to 1209-95 agenda) (Mr. Gaylord). In the interest of reaching the next item on the agenda, Mr. Gaylord decided, without objection, to defer this item to the agenda of a future meeting.

Agenda Item 7: Report of subcommittee to review ORCP 7 (see Attachment B to agenda of this meeting) (Judge Brewer). Judge Brewer began his report by running through and briefly summarizing each of the amendments to ORCP 7 now being considered by the subcommittee. Specifically, he explained that the amendment proposed in lines 11-12, p. 2, was intended to conform

subcommittee had identified some issues relating to ORCP 17 warranting further consideration. Two of these, he said, were what the burden of proof is when sanctions under ORCP 17 D(4) are awarded in the form of monetary penalties payable to the court and what procedures should be followed. He stated that the corresponding changes to FRCP 11 in 1993 failed, in his opinion, to provide much guidance. He said that he thought the burden of proof should be the same as for punitive damages, i.e., clear and convincing. He concluding by noting that, especially since the PLF policy has a blanket exclusion for punitive sanctions, a real problem appears to have been created, and offered, as a subcommittee member, to try to draft some language to ameliorate it. There was general agreement with the idea of the subcommittee attempting to draft some apt language that at some point could either be recommended to the legislature or possibly incorporated in an amendment promulgated by the Council.

Agenda Item No. 5: Report of subcommittee to review ORCP 55 I (see Attachment B to 12-9-95 agenda, Attachment B to 5-11-96 agenda, and Attachment C to 7-13-96 agenda) (Ms. Craine). Ms. Craine confirmed that the subcommittee agreed with the point made in Mr. James Walsh's letter that the 24 hours notice-to-patient period provided by 55 I is totally inadequate and is often likely to have the practical effect of violating the patient-physician privilege. She added that Prof. Holland had learned from a conversation with Mr. Tom Cooney, who played an important role on behalf of the Oregon Medical Association (OMA) in getting section 55 I enacted by the 1995 legislature, that the OMA had no intention of narrowing or undermining the patient-physician privilege. Mr. Gaylord added that it was his understanding that the OMA's purpose was to take the burden off doctors and other health care providers, when served with a patient records subpoena, of determining whether the patient had waived, or was then willing to waive, the privilege. Ms. Craine confirmed that that was her understanding as well. She added that perhaps the Council, or the subcommittee, should have some interaction with the Procedure & Practice Committee, and Judge Marcus suggested there might be some consultation with the OMA.

Mr. Hart suggested that a window of 15 days, as opposed to only 24 hours, might best protect everyone's interests. Several members commented that the notice period would have to be different for trial, as opposed to discovery, subpoenas. Mr. Gaylord noted that the issue of what the notice period should be was separate and distinct from the effect of a subpoena on the privilege. This discussion concluded without any action on the Council's part.

Agenda Item No. 6: Discussion of "broader issues" pertaining to ORCP 68 C(4)(c)(ii) (see Attachment B to 7-13-96

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DANNEE L. DAMERELL

June 7, 1996

Bill Gaylord
Attorney at Law
1400 SW Montgomery St.
Portland, OR 97201

Re: ORCP 55(I)

Dear Bill:

John Hart and I met to discuss the new legislative changes to ORCP 55(I).

In his May 1, 1996 letter James Walsh raises some legislative concerns.

If this bill was designed to lessen the confusion of doctors about whether or when to provide copies of their charts to third parties, it probably does not accomplish that.

The changes to 55(I) create some serious practical problems. Of main concern is the 24 hour notice. It is clearly inadequate. Minimally, a 15 day notice should be required to make this workable.

I will be out of State at the time of the council meeting on Saturday. I will try to be available by telephone for any discussion on Rule 55(I).

Sincerely yours,

Diana Craine

DC:kms

cc: John Hart
Maurice Holland

that all the Rule 7 amendments as set forth in Attachment A, and as revised by the succession of friendly amendments agreed to, be tentatively adopted. This motion carried by vote of 17 in favor, none opposed and 2 abstentions.

Mr. Hamlin then said that he would like to retain the option of further considering the validity of amendments adding the phrase "or by statute" at several places throughout section 7 D, especially in light of any adverse comments that might be received in response to publication and before the vote on final promulgation. He therefore moved, seconded by Mr. McMillan, that two alternative versions of the Rule 7 amendments be published, one with, and the other without, the added phrase "or by statute." Mr. Lachenmeier stated that, in his view, the amendments must all stand or fall together. This motion failed to carry by a vote of 2 in favor, 15 opposed, and 2 abstentions.

Judge Brewer noted that the subcommittee to review ORCP 7 also recommended tentative adoption of various amendments to Rules 68 and 69 relating to the Rule 7 amendments, as set forth on Attachment pp. A-24 to A-35. A motion, duly seconded, by Mr. Rasmussen tentatively to adopt all the amendments to ORCP 68 and 69 as set forth on the aforesaid pages carried by unanimous voice vote, but with paragraph 69 A(2)(c) omitted and paragraph 69 A(2)(a) revised to read as follows: "A(2)(a) that the plaintiff complied with the requirements of ORCP 7 D(4)(a)(ii), and ..."

Agenda Item No. 5: Report of subcommittee to review ORCP 55 I (*see* Attachments B to 12-9-95 and 5-11-96 agendas and Attachments C to 7-13-96 agenda and to agenda of the present meeting) (Mr. Hart). Without objection, Mr. Gaylord directed that this item be taken up out of order to avoid further delaying Mr. Jim Walsh, who was in attendance in order to make a statement on this matter. Mr. Hart invited the Council's attention to two alternative versions of subsection 55 I(2), hereinafter referred to as Proposals A and B, which he had drafted as set forth in Attachment C-3 of the present agenda. Mr. Gaylord noted that two other versions of proposed amendments to 55 I(2) had been distributed at, or prior to, the meeting, one prepared by Mr. Lachenmeier and the other by the OSB Procedure & Practice Committee, hereinafter referred to as Proposals C and D, respectively, copies of which are filed with the original of these minutes.

Judge Marcus remarked that, while it was clear to him that no waiver of the physician-patient privilege should be inferred under the existing 24-hours-to-object provision, he wondered whether extending the objection period to 10 or 14 days might

support an inference of waiver, if no timely objection were made, even if that was not the Council's intent.

Mr. Jim Walsh was then recognized to make a statement concerning subsection 55 I(2). He stated that the adoption of section 55 I by the 1993 legislature was ill-advised, and recommended that the Council vote to delete the entire section. Mr. Walsh also submitted a written statement for the record, a copy of which the Chair directed be filed with the original of these minutes.

Mr. Hart commented that there was presently pending before the Court of Appeals a case that might well clarify this area of the law regarding such questions as the discoverability of records pertaining to unrelated injuries. He therefore favored Proposal B because it responded directly, and in a limited fashion, to the immediate problem that has concerned Mr. Walsh and, apparently, others. Judge Marcus stated that section 55 I had been in effect for a biennium, that he doubted whether a supermajority of the Council was prepared to repeal it, and that he therefore favored Mr. Hart's Proposal B. Ms. Craine said that she had no strong preference as between Proposals A and B, but added that, regardless of which version is adopted, a staff comment should be provided making clear that 55 I was not intended to compromise or narrow the physician-patient privilege. A number of members then asked for further clarification of the differences among Proposals A, B and C. Mr. Gaylord responded that several different solutions had been proposed, one that would return Rule 55 to its status prior to the 1995 legislative session, another that would merely extend the objection period from 24 hours to 14 days, and Mr. Lachenmeier's proposal, which would make an explicit exception for medical records to be produced before a court or arbitrator. Mr. Hart noted that a great deal of the law about discoverability of patient records has been preempted by federal statutes.

Mr. Hamlin then moved, seconded by Judge Marcus, tentative adoption of the amendments to ORCP 55 I(2) prepared by Mr. Hart shown as "Proposed Language B" (see Attachment p. C-3), but not including the comment and also substituting for: "This 15-day period may be shortened or lengthened as the court may direct" as it twice appears in Proposed Language B the following: "Upon the showing of good cause, the court may shorten or lengthen the 15-day period." Several members questioned whether there was a need to repeat this sentence twice, but Mr. Hamlin stated that, to dispel any possible doubt, he thought it should be repeated. On the call of the question, the Hamlin motion carried by a vote of 16 in favor, 1 opposed and 2 abstentions.

Ms. Tauman then moved, seconded by Judge Marcus, that a new subsection 55 I(3) be added to address the mode of compliance with subpoenas of patient records, along the lines of 55 H(2) relating to privileges or restrictions on production of hospital records. After further discussion, Mr. Hamlin, seconded by Mr. Paradis, moved to table Ms. Tauman's motion. The motion to table carried by vote of 14 in favor, 1 opposed and 4 abstentions, following which Mr. Gaylord directed that this matter be carried over to the next biennium.

There followed further discussion on whether to adopt the comment to ORCP 55 H(2) as prepared by Mr. Hart (see Attachment p. C-3) or a differently worded comment. A motion of Mr. Hart, duly seconded, to adopt the comment he prepared carried by vote of 15 in favor, 2 opposed and 2 abstentions. Mr. Lachenmeier, seconded by Judge Isaacson, then moved to add the following language: "other than a subpoena requiring production of records of a party" following "subpoena" at each point where the latter appears. Mr. Lachenmeier stated that his intention was to go back to the old rule. This motion failed to carry by vote of 2 in favor, 12 opposed and 5 abstentions.

Agenda Item No. 4: Discussion of "broader issues" pertaining to ORCP 68 C(4)(c)(ii) (*see* Attachment B to agenda of this meeting) (Mr. Gaylord). Justice Durham began discussion of this item by explaining the reason why Oregon appellate courts frequently feel the need for trial court findings of fact and conclusions of law when called upon to review attorney fee awards. He added that appellate courts can experience real difficulty in determining whether to affirm a trial court's allowance of less than a requested fee in the absence of findings and conclusions. He further added that his proposed amendment to ORCP 68 C(4)(c)(ii), as set forth on Attachment pp. B-2-b to B-2-f, was intended to respond to the appellate courts' need for findings and conclusion in a manner that would minimize any additional burden on trial judges. The latter consideration, he added, was the reason his amendments provided for waiver of findings and conclusions unless requested in the statement or objection filed pursuant to ORCP 68 C(4)(a) or (b), the limitation to those findings and conclusions that are necessary to support the fee award, and the provision that findings and conclusions must be made only if requested by a party.

Mr. McMillan asked why, if there is a public interest in fee awards being understandable, findings and conclusions may be waived by the parties. Judge Marcus responded that, while in theory all rulings by judges should be understandable by the public as well as parties, under our adversary system judges do not normally inject themselves into matters not disputed among litigants. Judge Marcus added that he supported Justice Durham's

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*WASHINGTON AND OREGON BARS

September 10, 1996

Via Facsimile Only

Gilma Henthorne
University of Oregon School of Law
1101 Kincaid Avenue
Eugene, Oregon 97402

Re: ORCP 55

Dear Gilma:

Somehow I managed not to touch bases with John and Diane, but I do have my own draft version of 55I and it is enclosed herein. The major difference between the approach I took and the approach John took, is that I want to exempt completely from the rule subpoenas where a court, or in some cases, an arbitrator, has the ability to rule on the discoverability of the records. In a trial, other court proceedings, or an arbitration, you almost always have another side represented, and you always have a third party who can handle both the discovery issue and the admissibility issue. While I appreciate John's attempt to take into account my concerns, I still do not want to have to go to a court and ask to shorten the length of time to subpoena additional records. More than once a year, probably two or three times a year, my office finds out for the first time at trial about yet another medical provider that plaintiff had seen before, and we subpoena, while trial is going on, these additional records. When they arrive, the court then reviews them to determine whether I can look at them and then whether I can use them. But I do not have to tell anybody that I am going to do this, and I certainly do not apply to the court for permission to do this. I think that should continue to be the rule. Again, my apologies to both John and Diane for somehow managing not to get together with them concerning 55I.

Sincerely yours,

LACHENMEIER, ENLOE & RALL

Rudy R. Lachenmeier

RRL:kf
cc: Bill Gaylord
Diane Crane
John Hart

PROPOSAL C (attach to 9/14/96 minutes) C-1

Proposed Amendment to ORCP 55 I

ORCP 55 I

1(1) *Service on Patient or Health Care Recipient Required.* Except as provided in subsection 3 of this section, a subpoena duces tecum for medical records served on custodian or other keeper of medical records, ~~other than a subpoena requiring production before a judge or arbitrator,~~ is not valid unless proof of service of a copy of the subpoena on the patient or health care recipient, made in the same manner as proof of service of a summons, is attached to the subpoena served on the custodian or other keeper of medical records.

I(2) *Manner of Service.* ~~Other than subpoenas for records to be produced before a judge or arbitrator,~~ if a patient or health care recipient is represented by and attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient at least ~~24 hours~~ 14 days before the subpoena is served on a custodian or other keeper of medical records. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ORCP 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient at least ~~24 hours~~ 14 days before the subpoena is served on the custodian or other keeper of medical records. Service on a patient or health care recipient under this section must be made in the manner specified by ORCP 7 D(3)(a) for service on individuals.

I(3) *Affidavit of Attorney.* If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is valid if the attorney for the person serving the subpoena attaches to the subpoena the affidavit of the attorney attesting to the following: (a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b) That the party subpoenaing the records is unaware of ant attorney who is representing the patient or health care recipient; and(c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

I(4) *Application.* The requirements of this section apply only to subpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550, a health care service

C-2

contractor as defined in ORS 750.005, a home health agency licensed under ORS chapter 443 or a hospice program licensed, certified or accredited under ORS chapter 443

Proposal for ORCP 55 I

If a patient or health care recipient is represented by an attorney, a true copy of a subpeona duces tecum for medical records of a patient or health care recipient must be served on the attoney for the patient or health care recipient. The health care provider shall be directed by the subpoena to produce the medical records to the attorney representing the patient or health care recipient. Within 10 days of the receipt, the attorney shall produce the medical records to the requesting party or assert an applicable privilege.

PROPOSAL D (prepared by OSB Procedure & Practice Committee)

ATTACH TO 9/14/96 MINUTES)

***** NOTICE *****

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, December 14, 1996
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Call to order (Mr. Gaylord)

2. Approval of 9-14-96 minutes (attached)

3. Proposed amendments to Oregon Rules of Civil Procedure (attached) (Mr. Gaylord):

   a) RULE 7 (SUMMONS)
   b) RULE 17 (SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS)
   c) RULE 39 (DEPOSITIONS UPON ORAL EXAMINATION)
   d) RULE 52 (POSTPONEMENT OF CASES)
   e) RULE 55 (SUBPOENA)
   f) RULE 68 (ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS)
   g) RULE 69 (DEFAULT ORDERS AND JUDGMENTS)
   h) RULE 72 (STAY OF PROCEEDINGS TO ENFORCE JUDGMENT)

4. Old business

5. New business

6. Adjournment

# # # #

SUBPOENA
RULE 55

I Medical records.

* * * * *

I(2) **Manner of service.** If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient at least ~~24 hours~~ 15 days before the subpoena is served on a custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 15-day period. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ~~ORCP~~ Rule 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient at least ~~24 hours~~ 15 days before the subpoena is served on the custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 15-day period. Service on a patient or health care recipient under this section must be made in the manner specified by ~~ORCP~~ Rule 7 D(3)(a) for service on individuals.

* * * * *

COMMENT TO RULE 55

Subsection **I(2)** is amended to change from 24 hours to 15 days the minimum advance period a copy of a medical records subpoena must be served on the patient, health care recipient, or his or her attorney, before such subpoena is served on the custodian or other keeper of such records. This amendment is prompted by concern that requiring only 24 hours advance notice to the patient, etc., could often afford an inadequate opportunity for objection to a medical records subpoena, in the absence of which waiver of the patient-physician privilege might inappropriately be inferred. This subsection is not intended to modify or affect the patient-privilege provided for in the Oregon Rules of Evidence 504, 504-1, 504-2, 504-4, and 507.

Because, under some circumstances, a party issuing a medical records subpoena might be unduly delayed by having to wait a full 15 days for production, courts are given discretionary authority to shorten the waiting period for good cause shown.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

Maurice J. Holland
Executive Director

Proposed amendments by OSB Practice & Procedure Committee: Labeled in the margin as "P&PC"

Proposed amendments by Council on Court Procedures: Labeled in the margin as "CCP"

SUBPOENA
RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For production of books, papers, documents, or tangible things and to permit inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody, or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection

thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things but not commanded to also appear for deposition, hearing, or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents, or tangible things, the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is reasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. 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

#1 P&PC

NO