***** NOTICE *****
PUBLIC MEETING
COUNCIL ON COURT PROCEDURES

Saturday, May 20, 2000
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. Alexander)
2. Approval of minutes of April 8, 2000 meeting (attached)
3. Report of ORCP 44/55 Subcommittee (Mr. Gaylord)
4. Report of ORCP 54 A Subcommittee (Justice Durham)
5. Report of Jury Reform (ORCP 57-59) Subcommittee (Judge Harris)
6. Old business
7. New business
8. Adjournment

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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of April 8, 2000
5200 Southwest Meadows Road
Oregon State Bar Center
Lake Oswego, Oregon

Present:	J. Michael Alexander	William A. Gaylord
	Lisa A. Amato	Daniel L. Harris
	Benjamin H. Bloom	Rodger J. Isaacson
	Bruce J. Brothers	Michael H. Marcus
	Lisa C. Brown	Connie Elkins McKelvey
	Ted Carp	John H. McMillan
	Kathryn S. Chase	Karsten H. Rasmussen
	Allan H. Coon	Ralph C. Spooner
	Don A. Dickey	Nancy S.Tauman
	Robert D. Durham	Richard L. Barron
Excused:	Kathryn H. Clarke	
	Mark A. Johnson	
	Virginia L. Linder	

The following guests were in attendance: Attorney David S. Barrows, representing Oregon Association of Process Servers (OAPS); Patricia Bennett, President, OAPS, Gloria Carter, member, OAPS, Jason Crowe, Legislative Chair, OAPS, and Amanda Rich, lobbyist for OAPS. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. Mr. Alexander called the meeting to order at 9:32 a.m.

Agenda Item 2: Approval of minutes. The minutes of the February 12, 2000 were, without objection, approved as distributed to members with the agenda of this meeting.

Agenda Item 3: Reports regarding items of pending business (Mr. Alexander). (Note that, in order to accommodate guests, the following items were taken up in the order shown below rather than the order indicated on the agenda of this meeting.)

b. Report of ORCP 7 Subcommittee (Judge Rasmussen) (see Attachment B to agenda of this meeting, copies of which were distributed at the beginning of this meeting and a copy of which is filed with the original of these minutes). Judge Rasmussen briefly summarized the proposed amendments to ORCP 7 D as shown in Attachment B and the purposes they were intended to achieve. Mr. Alexander said that the

proposed amending language appeared to accomplish the purposes stated by Judge Rasmussen. Mr. Brothers commented that the provision for service at places of regular employment risked severe embarrassment to persons thus served, and that he was inclined to oppose such service method. Mr. Bloom stated that the full Council should give careful consideration to whether service by delivery to a personnel manager or equivalent would afford adequately reliable notice to meet the standard of due process.

Judge Marcus asked what was meant by the proposed new language in ORCP 7 D(2)(d)(ii) [Attachment p. B-1, lines 6-8]: "or designated by this section to receive service on the defendant's behalf, ..." Judge Rasmussen explained that this proposed language had nothing to do with the proposal regarding service at places of regular employment, but was intended to cover possible situations where the person signing the receipt for a mailing might not be, technically speaking, an agent of the defendant. Judge Rasmussen agreed with the general sense of the members that the Subcommittee should give further thought to whether the language questioned by Judge Marcus would be necessary or appropriate.

Judge Rasmussen then explained the difference between Alternatives A and B [Attachment B, lines 20-26], namely, that if the former were adopted, office service could be made even if no prior attempt had been made to effect service at the defendant's residence, whereas Alternative B would require that at least one such prior attempt be made. Mr. Gaylord queried how Alternative B would work if the plaintiff doesn't know where the defendant resides. Judge Rasmussen commented that adding the words "last known" might solve this problem.

Mr. McMillan stated that he would never vote in favor of an amendment authorizing service at places of employment. He added that, if he were an employer, he would never allow a process server on his premises, and also noted that many businesses have quite a few independent contractors on their premises, applicability to which would be doubtful.

Mr. Alexander asked the guests affiliated with the OAPS whether they wished to offer any comments. Mr. Jason Crowe, Legislative Chair, OAPS, responded that the option of effecting service at places of employment would save a great deal of trouble and expense. He added that the purpose of the proposed amendments now under consideration was not to make the work of servers easier, but to make the process of accomplishing valid service more efficient and less costly. He also said that residence service is always servers' first preference, but that there are circumstances where requiring abode service results in nothing but waste of time and added expense. Ms. Amanda Rich, lobbyist for

OAPS, stated that Rhode Island has a statute making it unlawful for employers to bar servers entering places of employment to make service. Mr. Alexander and Judge Marcus commented that a provision of that sort would exceed the authority of the Council.

Mr. Alexander then called for a straw vote to determine how many members would be inclined to support, and how many inclined to oppose, any provision authorizing service at places of regular employment. Ten members expressed themselves as inclined to support such a provision, and nine members expressed themselves as being inclined to oppose it.

Discussion of this item concluded by Mr. Barrows stating that, after consultation with the OAPS, he would prepare a working paper addressed to the Subcommittee containing that organization's thoughts and suggestions on how these issues might best be resolved. Mr. Alexander stated that any communication from the OAPS would be welcomed by the Council and the Subcommittee. Mr. McMillan commented that it would be helpful if any document prepared on behalf of the OAPS were to include possible legislative solutions. Mr. Barrows expressed the OAPS's appreciation to Judge Rasmussen and other members of the ORCP 7 Subcommittee for the hard work and effort being devoted to this task.

a. Report of ORCP 44/55 Subcommittee (Mr. Gaylord) (see "Final Working Draft - 4/3/00, copies of which were distributed at the beginning of this meeting, and a copy of which is filed with the original of these minutes). Mr. Gaylord briefly recapitulated the principal goals which this Subcommittee has sought to accomplish as follows: i. to preserve the relevant evidentiary privileges both technically and practically; ii. to comply with federal disclosure requirements; iii. to facilitate the full exchange of information as efficiently and at least cost as possible; iv. to limit the burden of compliance on the part of health care providers; v. to ensure that all litigants receive accurate and complete records to the extent they are entitled to them; and, vi. to resolve the existing inconsistencies between Sections 55 H and I.

Mr. Gaylord continued by outlining the methodology by which the proposed amendments would achieve the aforementioned goals. He explained that proposed 44 C(2)(a) would keep in place the existing procedure by which health care records may be obtained by means of a request for production of such records, and also the option of requesting production of a written release to the discovering party, which would then use the release to obtain the records from the records custodian.

Mr. Gaylord further explained that proposed 44 C(3) is the

take-off point for a new concept relating to obtaining health care records directly from records custodians. Proposed 44 C(3) provides that health care records may be obtained, at least within the confines of formal discovery, from a party exclusively by the alternative methods set forth in 44 C(2)(a) or (b), or from a health care provider exclusively by the methods set forth in proposed 55 H, which incorporates several existing statutory definitions and is also drafted to assure compliance with existing federal disclosure requirements. He further noted that H(2) contemplates an innovative procedure for obtaining health care records directly from health care providers, including but not limited to hospitals, which calls for prior service on the party whose records are being sought of a subpoena directed to the appropriate custodian, together with an "Authorization to Disclose Health Care Records" in compliance with ORS 192.525(3). He added that, pursuant to federal disclosure requirements, certain kinds of hospital and other kinds of health care records may not be obtained by subpoenaing the records custodian unless the subpoena is accompanied by the authorization of the patient. He also pointed out that all of the critical terms employed by the proposed amending language incorporates existing statutory definitions, so there should be no uncertainty as to their precise meaning.

Mr. Gaylord continued by stating that a great deal of careful thought had gone into ensuring that objections to discovery, either by way of privilege or as being beyond the proper scope of discovery, are protected both in theory and practice. The most frequent stage at which any objections could be raised would be within 14 days after service of the subpoena and authorization on the party whose records are sought, when such party could serve written objections on the discovering party. That party would then have the option of moving for an order to compel pursuant to ORCP 43 B. The party whose records are sought would also have the option of moving for a protective order, limiting the obligation to produce records, pursuant to ORCP 36 C. Another innovative feature of the proposed amendments is the provision for a "Statement of Instructions," to be prepared by the party whose records are sought and served by that party on the custodian along with the subpoena and the authorization. Proposed 55 H(6)(a)(i) is intended to reduce the burden of discovery on parties and also on records custodians by providing that the names of all parties or their attorneys wishing to obtain copies of the records may be included in the instructions.

Ms. Amato stated that the Subcommittee had made every effort to ensure not only that its proposed amendments would work with existing federal and state law, but also that they will work with a law which Congress is now in the process of enacting. She added that Congress has missed the 8/21/99 deadline for passing a

comprehensive privacy act, and that the Secretary of Health and Human Services has also missed the deadline for implementation of regulations. She said, however, that the Subcommittee had carefully studied the Secretary's proposed regulations, and, subject to only one concern, has concluded that the proposed ORCP 44 and 55 H and I amendments will be entirely consistent with such regulations. That single concern, she added, is that the specific language of the "Authorization to Disclose Health Care Records," as set forth in proposed 55 H(2)(b), must comply with regulations as to which the Secretary is still seeking comments. The Subcommittee will, of course, keep a close watch on how those federal regulations emerge in final form.

Ms. McKelvey stated that, while she greatly appreciated the very hard and thoughtful work done by the Subcommittee, she nonetheless had some concerns as an attorney who often represents medical defendants. One of those concerns, she said, was that the number of stages at which the plaintiff's attorney can object to records requests or subpoenas, and the need to first serve that attorney, could lead to delays in obtaining records needed for other discovery and in preparation for trial. By her calculation, she added, under the proposed amendments it could take as much as two months to obtain health care records, and that could pose problems given the fact that trials are often scheduled for 12 months after filings of complaints. She added that her second concern was that the proposed amendments appear to require authorizations in all cases where health care records are requested or subpoenaed, but, she pointed out, such authorizations are required only for records which contain information about certain matters, such as HIV testing. Her third concern, she concluded, was that, if a plaintiff happened to be out of the country, there might be an extended delay before his or her attorney could obtain the required signature.

Discussion of this item concluded by Mr. Gaylord's asking any member who wished to comment on these proposed amendments to forward such comments to the Subcommittee as promptly as possible, hopefully early enough so that the Subcommittee will have them prior to the May 20 Council meeting. Justice Durham commented that he thought it extremely important that any members absent at this meeting be brought up to date on the issues they raise, so that the Council has the benefit of everyone's possible concerns and suggestions at the earliest possible date.

c. Report of Jury Reform Subcommittee (Judge Harris) (see memo by Judge Harris dated April 4, 2000 faxed to all members, a copy of which is filed with the original of these minutes). Judge Harris reported that the Subcommittee was inclined to limit its consideration to the first five items shown in his April 4 memo. He asked for the members' approval for this

project to be discussed at the forthcoming meeting of the Judicial Conference, which was unanimously agreed to. He added that the Subcommittee will keep in touch with similar work that is underway on the part of the OSB Procedure and Practice Committee and of the Civil Law Advisory Committee, and with judges in Arizona. Judge Harris concluded this report by saying that the Subcommittee plans to bring more refined proposals for possible amendments which might be needed to ORCP 57 through 59 at the Council's June meeting.

NOTE: Agenda Items 3d through 3i were deferred to one or more future meetings of the Council.

Agenda Item 4: Old business. No item of old business was raised.

Agenda Item 5: New business. No item of new business was raised.

Agenda Item 6: Adjournment. Without objection Mr. Alexander declared the meeting adjourned at 12:03 p.m.

Respectfully submitted,

Maury Holland
Executive Director

COUNCIL ON COURT PROCEDURES

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May 10, 2000

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland

Re: **Proposed ORCP Amendments for Consideration at the May 20 Meeting**

Attached are proposed amendments to ORCP 44, 54, and 55 which will be considered at the 5-20-00 meeting. The Jury Reform Subcommittee is working on some proposed amendments to ORCP 57-59, which are not ready for distribution at this time, but will, if time permits, be mailed to you prior to the meeting or, if not, will be distributed at the meeting.

Also attached are proposed amendments to ORCP 7 D. Depending on how much time is available, these might be reached at the 5-20-00 meeting as an item of "old business."

Finally, please note the attached letter from Larry Thorp, a former Council member, critical of the now withdrawn proposed amendment to ORCP 7 D that would have authorized service at places of employment, and the attached copy of a fax from Tom Cooley critical of some aspects of the amendments proposed to ORCP 55 H and I.

Encs.

For Distribution at 4-8-00 Council Meeting

Amendments to Section 54 E Proposed by Rule 54 Subcommittee

{{Matter to be added in **bold underlined**; to be deleted in [*italics enclosed in square brackets*]

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

more favorable judgment, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

FINAL WORKING DRAFT - 4/3/00

Note: Additional new language is bolded and underlined; deleted language is italicized and bracketed.

Amendments to ORCP 44:

RULE 44. PRETRIAL DISCOVERY OF HEALTH CARE RECORDS; PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS[1]

A. Order for examination.

(text unchanged)

B. Report of examining physician or psychologist.

(text unchanged)

[C. Reports of examinations; claims for damages for injuries. (delete text of section in its entirety)]

C. Health Care Records.

C(1) As used in this rule, "health care records" means medical records as defined in ORS 192.525(8), and health

care records of a health care provider as defined in ORS 192.525(9) and (10), and health care records of a community health program established under ORS 430.610 through 430.695.

C(2) *Pretrial discovery of health care records from a party.* Any party against whom a civil action is filed for damages for injuries to the party or to a person in the custody or under the legal control of a party, or for damages for the death of a person whose estate is a party, may obtain copies of all health care records within the scope of discovery under Rule 36 B by either

C(2)(a) serving a request for production for such records on the injured party or its legal custodian or guardian pursuant to ORCP 43; or

C(2)(b) obtaining the voluntary written consent to release of the records to such party from the injured party or its legal custodian or guardian before seeking them from the health care provider.[2]

C(3) *Pretrial discovery of health care records directly from health care provider or facility.* Health care records within the scope of discovery under Rule 36 B may be obtained by a party against whom a civil action is

filed for damages for injuries to the party or to a person in the custody or under the legal control of a party, or for damages for the death of a person whose estate is a party, only by the procedure described in section (2)(b) above, or by the procedures described in ORCP 55 H, Pretrial subpoena of Health Care Records from health care provider or facility.[3]

[D. Report; effect of failure to comply. (delete section in its entirety)]

[E. Access to hospital records. (delete section in its entirety)]

* * * * *

Amendments to ORCP 55 H.

RULE 55. SUBPOENA

(A. through G. unchanged.)

H. *[Hospital Records]* **Pretrial subpoena of health care records from health care provider or facility.**

[H(1) Hospital. (existing text deleted entirely)]

H(1) For purposes of this section, "health Care records" are defined in ORCP 44 C (1).

NOTE: The basic existing language in H(2), H(2)(a), H(2)(b), H(2)(c) and H(2)(d) is now contained in H(7) with appropriate changes.

H(2) Except when it is provided with a voluntary written consent to release of the health care records pursuant to ORCP 44 C(2)(b), any party against whom a civil action is filed for damages for injuries to the party or to a person in the custody or under the legal control of a party, or for damages for the death of a person whose estate is a party, may obtain copies of health care records within the scope of discovery under Rule 36 B directly from a health care provider or facility only by serving upon the party whose health care records, or whose decedent's health care records are sought:[4]

H(2)(a) a form of SUBPOENA for such records directed to the health care provider, accompanied by statutory witness fees calculated as for a deposition at the place of business of the custodian of the records, and

H(2)(b) simultaneously, an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS in the form provided by ORS 192.525(3), on which the following information has been designated with reasonable particularity: the name of the health care provider or providers or facility or facilities from which records are sought, the categories or types of records sought, and the time period, treatment, or claim for which records are sought. If the name of a health care provider or facility is unknown to the party seeking records, they may designate "all" health care providers or facilities, or "all" of them within a described category. The AUTHORIZATION shall designate the attorney for the party whose records are sought, or that party if unrepresented, as the persons to whom the records are released.[5];

H(3) Within 14 days after receipt of service of such a SUBPOENA and AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS, a party whose records are sought shall:

H(3)(a) as to any part of the request to which it does not object, obtain the signature of a person able to consent to the release of the requested records or authorized by law to obtain the records, as used in ORS 192.525 (2), and a date of signature, on the AUTHORIZATION and, either

H(3)(a)(i) return it to the requesting party for its use in obtaining records directly from the health care provider(s) or facility(s),

or

H(3)(a)(ii) serve the SUBPOENA and AUTHORIZATION by mail on the health care provider or providers or facility or facilities indicated, along with the STATEMENT OF INSTRUCTIONS provided in section 3 below; and

H(3)(b) as to any part of the SUBPOENA and AUTHORIZATION to which it does object, serve a written objection pursuant to ORCP 43 B on the party seeking the discovery.[6]

H(4) Upon receipt of an objection to all or part of a SUBPOENA and AUTHORIZATION pursuant to subsection (2)(b) above, the party issuing the SUBPOENA and AUTHORIZATION may seek an order compelling discovery, pursuant to ORCP 46.

H(5) Upon serving an objection to part or all of a SUBPOENA and AUTHORIZATION pursuant to subsection (2)(b) above, the objecting party may seek an order limiting

extent of disclosure, pursuant to ORCP 36 C.[7]

H(6) *Statement of instructions.* Along with a SUBPOENA and AUTHORIZATION for health care records directly from a health care provider or facility hereunder, the party whose records are sought shall prepare and serve on the hospital or health care provider with the AUTHORIZATION the following STATEMENT OF INSTRUCTIONS:[8]

H(6)(a) Enclosed with this STATEMENT OF INSTRUCTIONS is a statutory SUBPOENA and AUTHORIZATION TO DISCLOSE MEDICAL RECORDS pursuant to ORS 192.525(3) which has been signed by a person able to consent to the release of the requested records or authorized by law to obtain the records. Copies of the designated records are sought by each of the following parties:

H(6)(a)(i) (name and address of person whose records are sought, or their attorney)

H(6)(a)(ii) (name and address of each other party or their attorney who seeks access to the records)

H(6)(b) In order to comply with this Authorization and these instructions, please make copies of the designated records, place each copy in a separately sealed package bearing the address and postage to each of the names identified above, and place all of them together in one package or shipment, and mail that package within five (5) days of this date to the person whose records are sought or their representative, whose name and address are listed first above. Only _____ (name of person or their attorney whose records are sought) is authorized to receive the copies of these records directly from you.[2]

H(6)(c) The STATEMENT OF INSTRUCTIONS shall be signed by the party whose records are sought, or their attorney, and a copy served with a certificate of service pursuant to ORCP 9 C on each party or their attorney, seeking discovery of the health care records.

H(7) *Mode of Compliance.* [The following is the existing first paragraph of 55 H(2) verbatim, but with "hospital records" changed to "health care records" and "hospital" changed to "health care provider" and "pretrial" added] *[Hospital]* Health care records may be obtained by subpoena pretrial 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.[10]

H(7)(a) (The following is existing language in 55 H(2)(a) with the same changes in terminology and additional appropriate language changes; the reference to subsection (3) has been changed to subsection (8).) Except as provided in subsection *[(4)]* **(9)** of this section, when a subpoena is served upon a custodian of *[hospital]* **health care** records in an action in which the *[hospital]* **health care provider** is not a party, and the subpoena requires the production of all or part of the records of the *[hospital]* **health care provider** relating to the care or treatment of a patient *[at]* **of** the *[hospital]* **health care provider**, it is sufficient compliance therewith if a custodian delivers by mail or otherwise *[a]* **the number of** true and correct *[copy]* **copies** of all the records responsive to the subpoena **indicated in the subpoena or statement of instructions**, within five days after receipt thereof. Delivery shall be

accompanied by the affidavit described in subsection (8) of this section. The *[copy]* **copies** may be photographic or microphotographic reproduction.

H(7)(b) (The following is existing language in 55 H(2)(b) modified consistent with STATEMENT OF INSTRUCTIONS in H(6) above.) The *[copy]* **copies** of the records shall be separately enclosed in *[a]* sealed envelope**s** or wrapper**s** on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope**s** or wrapper**s** 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 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]* **to the person whose records are sought or their representative, whose name and address are listed in the STATEMENT OF INSTRUCTIONS, pursuant to section H(6)(a)(ii) herein.**

H(8) (Title of existing H(3)) ***Affidavit of custodian of records.***

H(8)(a) (The following is existing language in existing H(3)(a) with appropriate changes.) The records described in this section shall be accompanied by the affidavit of the custodian of the *[hospital]* **health care provider**, 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] **copies are** true *[copy]* **copies** 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]* **health care provider**, in the ordinary course of *[hospital]* **its** business, at or near the time of the act, condition, or event described or referred to therein.

H(8)(b) (The following is existing language in H(3)(b) with appropriate changes.) If the *[hospital]* **health care provider** 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(8)(c) (The following is existing language in 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(9) (Existing title of H(4)) ***Personal attendance of custodian of records may be required.***

H(9)(a) (The following is existing language in H(4)(a) with appropriate changes.) The personal attendance of a custodian of *[hospital]* **health care provider** records and the production of original *[hospital]* **health care provider** records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of *[hospital]* **health care provider** 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)]* **55 H(7) and (8)** shall not be deemed sufficient compliance with this subpoena.

H(9)(b) (The following is existing language in H(4)(b) with appropriate changes.) If more than one subpoena duces tecum is served on a custodian of *[hospital]* **health care provider** 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 tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.]

H(10) ***Fees for copies.*** **A health care provider may charge a reasonable fee for responding to a release authorization or subpoena for health care records. A reasonable fee for copying and providing such records shall not exceed twenty-five cents ($0.25) per page, less any prepaid witness fee, in the absence of personal attendance by the custodian of the records.**[11]

H(11) ***Obligation of party or attorney of party whose health care records are received from health care provider pursuant to subpoena.*** **Upon receipt of the sealed copies of the health care records addressed to each of the parties seeking access to them, the party whose records are sought, or his or her attorney, shall open only the copy addressed to that party or attorney, and shall have 14 days in which to review them. Not later than 14 days after receipt of the records from the health care provider or facility, the party whose records are sought shall either serve the unopened copies of the records on each party seeking them, or shall serve each such party with objections to their production pursuant to ORCP 43 B.**

H(11)(a) *Privilege or objection log.* When a party objects to the provision of health care records otherwise discoverable by subpoena pursuant to this section, the party shall make the objection expressly and shall describe the nature of the records objected to in a manner that, without revealing information which is privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

H(11)(b) *In camera review.* In the event of a motion to compel production of any health care records which have been received by the party whose records are sought pursuant to this section, that party shall deliver the sealed copies of those records to the court for *in camera* review within the time permitted for filing its response to the motion to compel.

H(12) Nothing contained in this rule, or in the use of the AUTHORIZATION TO DISCLOSE MEDICAL RECORDS shall constitute a waiver of any common law or statutory privilege against disclosure of any health care records, or any other confidential communication between any party and a health care provider or facility, beyond the contents of the records for which disclosure is specifically authorized, and to the parties to whom disclosure is specifically authorized under this section.

H(13) Any health care records obtained pursuant to this rule shall only be used for purposes of the pending litigation. After the litigation is resolved, the health care records shall be either returned to the party whose records they are or destroyed.

* * * * *

Amendments to 55 I

RULE 55

[Medical Records] [Note: all of existing 55 I is deleted, though not shown here][12]

I. Subpoena of health care records for trial; attendance of custodian with original records at trial

I(1) Notwithstanding Rule 55 H, a subpoena of health care records to trial may be served directly on the health care facility or its health care records custodian by the party seeking the health care records without an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS described at Rule 55 H(2)(b) above, or a STATEMENT OF INSTRUCTIONS described at Rule 55 H(6) above.

I(1)(a) Except as indicated in section I(2), it is sufficient compliance with such a subpoena 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, sealed in an envelope addressed to the clerk of the court where the action is pending, accompanied by an affidavit described in ORCP 55 H(8). The copy may be photographic or micro photographic. 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 health care provider or facility, 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 shall be addressed to the clerk of the court, or to the judge if there is no clerk.

I(1)(b) The package containing records produced in response to a subpoena to trial shall remain sealed and shall be opened only at the time of trial at the direction of the judge or with agreement of the parties. The records shall be opened in the presence of all parties who have appeared. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian who submitted them.

I(2) The personal attendance of a custodian of health care records and the production of original health care records at a trial or deposition is required if a subpoena duces tecum contains the following statement:

> The personal attendance of a custodian of health care records and the production of the original records is required by this subpoena. The procedures authorized by ORCP 44 C or ORCP 55 H shall not be deemed sufficient compliance with this subpoena.

* * * * *

NOTES

1. *It is our belief that so long as A and B of Rule 44 remain, C, D, and E can be deleted without changing any of the practical effects of these rules, under the assumption that we are now comprehensively providing three alternative methods (request for production, request for signed release, and subpoena-release), and related sanctions, for obtaining what should amount to all medical records. We will need to consider the question whether some parts of D still need to be separately stated, before finalizing our recommendations.*

2. *Re 44 C(2): We do not mean to be inadvertently changing prior rules so as to permit discovery of one person's records from some other person who has no duty or motive to protect them, e.g., a previous party in this action or some other action who has received them for purposes of that previous or other action. Among other things, the above new language intends to make clear this is about getting the patient's records from them or their legal representative in this*

action.

Also, subsection (b) was added recently to make sure we are not foreclosing practitioners from exchanging a signed release form from the patient which allows another party to seek the records themselves, as is sometimes done. When that method is not agreeable to the patient or its attorney, or is not sufficient to spring loose the records in the eyes of the provider, or is not adequately certain to get the full records in anyone's mind, the rest of these rules may be invoked.

3. We propose this new provision in ORCP 44 as a cross-reference to 55 H, leaving all subpoena rules and procedures in chapter 55, where someone thinking about it that way would look first, while also guiding the person who looks first in ORCP 44 because it is essentially a matter of pretrial discovery, related by objective to the rest of ORCP 44.

4. Re: 55 H(2): The emphasis on exclusivity of these methods (release signed by patient and given to opponent, or our new subpoena-release method) for getting records "directly" from providers is to avoid questions whether they are still subject to subpoena

under the old rules we are trying to replace.

5. An obvious question may be asked: Why does this use both a subpoena and a "release" to get the records? The answer is that the subcommittee wants both the automatic enforcement mechanisms of the subpoena power (without the need to invent new mechanisms, or connect into other existing ones) and the additional detailed instructions we are more comfortable placing in the release document. Additionally, combining the two instruments ought to lay to rest any lingering uncertainty among providers about whether a subpoena or a release gives them the broader authority/ requirement to comply. Some practitioners have had providers balk at releasing records either because no subpoena or no release signed by the patient had accompanied the request. This may stem from interpretations of the federal statutes protecting certain mental health records, drug records, and perhaps AIDS testing records, which seem to require written consent of the patient regardless of subpoena.

6. Re: 55 H(3)(b): This is our provision of an initial opportunity to assert privilege or scope of discovery objections.

7. *Re: 55 H(4) and (5): We intend to preserve the two-way street for seeking court guidance or sanction, so that either party can go forward to seek a remedy against the subpoena or its resistance.*

8. *Re: 55 H(6): The reason for this additional instructional enclosure is our recognition of the difficulty using rules of civil procedure, which by their nature apply to parties but not strangers to the litigation, to force non-parties to do something. It is not out of the question to make these same instructions into rules mandating action by the recipient of the subpoena if anyone is concerned that medical providers will resist or fail to comply with these steps.*

9. *Re: 55 H (6)(b): The blanks in the instruction form are for flexibility. Intent is that the number of copies will be determined by the number of litigants desiring to receive the production. The name blank is for the party whose records are sought. We should consider whether these points need more spelling out in the rule.*

10. *Re: 55 H (7): This section, with slight word changes, is preserved from the Council's recent amendments to*

solve problems medical providers had with apparent inconsistencies between our rule and federal protections of certain medical records. We should not have to re-hash that recent work.

11. *We recognize that any attempt to limit costs of medical records copies may become controversial, but there is a consensus of the subcommittee to "run it up the flagpole".*

12. *Re: 55 I: We recognize there will be confusion and perhaps unwanted changes in practice if our new discovery procedures are not clearly distinguished from what one does to subpoena medical records to court for trial, or to subpoena records custodians and original records for trial show-and-tell. Because this is a different subject and 55 H is already quite long, using 55 I seems logical for this placement.*

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‡ Also Member of Washington Bar

RAYMOND F. MENSING, JR.
(1930-1999)

May 10, 2000

VIA FACSIMILE & U.S. MAIL

Mr. J. Michael Alexander
Burt Swanson Lathen
Alexander & McCann PC
388 State Street, Suite 1000
Salem, OR 97301

Mr. William A. Gaylord
Gaylord & Eyerman PC
1400 SW Montgomery Street
Portland, OR 97201

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

RE: Proposed Amendments to ORCPs 44 & 55 Relating to Medical Records

Gentlemen:

I've reviewed the proposed ORCP changes and I can tell you that having the physician's office make multiple copies of requested medical records and placing them in sealed envelopes, addressed to the various defendants will be strongly opposed by the medical profession. Physicians' offices currently are inundated with paperwork. In a case where a patient may have a large file and there may be multiple defendants, it would turn the physician's office into a photocopy center. If anybody is going to make the copies, it should be one of the parties' attorneys. I also see tremendous cost increases for both plaintiffs' and defense counsel under this system.

I can tell you the physicians' offices will be heavily burdened if this goes through.

Sincerely,

Thomas E. Cooney
(tecooney@pdxemail.com)

TEC:msb

P:\WP7\TTJ\MISC\HAGANS.10

Acknowledged 4-18-00

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MARVIN O. SANDERS (1912-1977)
JACK B. LIVELY (1923-1979)
JILL E. GOLDEN (1951-1991)

April 10, 2000

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

Re: Proposed Amendments to ORCP 7D.

Dear Professor Holland:

I received a copy of the mailing to the Council on Court Procedures containing the proposed amendments to ORCP 7D. Although I don't know the background of the proposal, I am very surprised to see that it includes a provision for substituted service on the personnel director at the defendant's place of employment. While that may be a good way to obtain service, I think it is extremely poor public policy. I can just see the problems it will create for employees, since the litigation probably will have nothing to do with a defendant's employment, and if it did, it could create a greater problem. It could also prove to be extremely embarrassing. For example, service could be made on the personnel director in litigation for a divorce. In all likelihood that information would become common knowledge among the defendant's fellow employees and prove to be embarrassing.

I strongly recommend that the Council not adopt the amendment permitting service on the personnel director at a defendant's place of employment.

Very truly yours,

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

Laurence E. Thorp

LET:mkf

Rule 7 Subcommittee's Proposed Amendments to ORCP 7 D
(May 10, 2000)

{Matter to be added in **bold underlined**; to be deleted
[*italicized and enclosed in square brackets*]}

RULE 7. SUMMONS

* * * *

D(2)(d)(ii) **Calculation of time.** For the purpose of computing any period of time provided by these rules or by statute, service by mail, except as otherwise provided, shall be complete on the day the defendant**, or other person authorized by appointment or by law,** signs a receipt for the mailing, or three days after the mailing if mailed to an address within the state, or seven days after the mailing if mailed to an address outside [*of*] the state, whichever first occurs.

* * * *

D(3)(a)(i) **Generally.** Upon an individual defendant, by personal [*service upon*] **delivery of a true copy of the summons and the complaint to** such defendant or **to** an agent authorized by appointment or law to receive service of summons **on behalf of such defendant** [*or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then*], by substituted service**, or** by office service.[*upon such defendant or agent.*] Service may also be made upon an individual defendant to whom neither subparagraph (ii) nor (iii) of this paragraph applies by mailing made in accordance with paragraph (2)(d) of this section provided the defendant signs a receipt for the certified, registered or express mailing, in which case

service shall be complete on the date on which the defendant signs a receipt for the mailing.

* * * *

D(4)(a) **Actions arising out of the use of roads, highways,** [*and streets*] **or premises open to the public; service by mail.**

D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, [*or*] streets of**, or premises open to the public as defined by law within,** this state, if the plaintiff makes at least one attempt to serve the defendant who operated such motor vehicle, or caused it to be operated on the defendant's behalf, by a method authorized by subsection (3) of this section except service by mail pursuant to subparagraph (3)(a)(i) of this section and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph (2)(d) of this section addressed to that defendant at:

* * * *

D(4)(b) **Notification of change of address.** [*Every motorist or user of the roads, highways, or streets of this state*] **Any person** who, while operating a motor vehicle upon the roads, highways, [*or*] streets of**, or premises open to the public as defined by law within,** this state, is involved in any accident, collision, or other event giving rise to liability, shall forthwith notify the Department of Transportation of any change of such defendant's address occurring within three years after such accident, collision, or event.

* * * *

May 15, 2000

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland

Re: **May 20 Meeting: Jury Reform Proposed Amendments**

Attached are amendments to ORCP 58 A and B proposed by the Jury Reform Subcommittee.* These are on the agenda for discussion at the May 20 meeting.

*Dan Harris, Chair; Ted Carp, Don Dickey, Mark Johnson, and John McMillan, members.

Jury reform proposals being considered by the Council on Court Procedures

The subcommittee has met to consider the feedback received from the judicial conference and, from that and other input, to refine the proposals before the committee for presentation to the full council for discussion.

PROPOSAL No. 1 - Amendments to ORCP 58 A and B
(Amending language in bold; deleted language in [brackets])

A. Order on Proceedings on Trial by the Court.

Trial by the court shall proceed in the order as prescribed in subsections (3) through (6) of section B of this rule unless the court for good cause stated in the record otherwise directs.

B. Order of Proceedings on Jury Trial.

The trial by a jury shall proceed in the following order unless the court, for good and sufficient reason stated in the record, otherwise directs:

B. (1) **The jury shall be selected and sworn. Prior to voir dire, each party may, with the court's consent, present a brief neutral statement of the facts to the entire jury panel.**

B. (2) **After the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting questions of witnesses if permitted, and the elementary legal principles that will govern the proceedings.**

B. (3) The plaintiff shall concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, shall state defendant's case based upon any defense or counterclaim.

B. (4) The plaintiff shall [then] introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.

B. (5) The parties respectively [then] may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense or counterclaim.

B. (6) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the

jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

B. (7) Not more than two counsel shall address the jury on behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours.

B. (8) **After the evidence is concluded, the court shall instruct the jury. The instructions may be given before or after the closing arguments.**

B. (9) **With the court's consent, jurors are permitted to submit to the court questions directed to witnesses or to the court. The parties shall be given an opportunity to object to such questions out of the presence of the jury.**

PROPOSAL No. 2 - Alternate juror rule amendments

A number of proposals have been discussed regarding the method of selecting alternate jurors. The goal is to improve the experience from the juror's perspective. The proposals have principally centered around two possible new methods for selecting alternate jurors:

1. Do not distinguish between the jurors and alternates until the end of the case. The following language was suggested by the OSB Procedure and Practice Committee for this approach:

> The identity of alternate jurors shall not be determined until the end of the trial. At the time of impanelment, the trial judge shall inform the jurors that at the end of the case, the alternate jurors will be determined by lot in a drawing held in open court.

2. Choose the alternate jurors during jury selection, but don't tell the jurors who the alternates are until the case is handed off to the jury at the end of the trial. The court and counsel would know who they are at the time of selection.

It is recommended that this issue be studied further before being formally considered by the council.

Two Proposals by Jury Reform Subcommittee*
May 20, 2000 Council Meeting

PROPOSAL 1: To amend ORCP 58 A and B as shown below (language to be added in bold underlined; to be deleted [*in italics enclosed in square brackets*].

RULE 58. TRIAL PROCEDURE

A. Order of Proceedings on Trial by the Court. Trial by the court shall proceed in the order as prescribed in subsections ([*1*] **3**) through ([*4*] **6**) of section B of this rule[,] unless the court[,] for [*special reasons,*] **good cause stated in the record** otherwise directs.

B. Order of Proceedings on Jury Trial. [*When the jury has been selected and sworn, the trial, unless the court for good and sufficient reason otherwise directs, shall proceed in the following order*] **The trial by a jury shall proceed in the following order unless the court, for good and sufficient reason stated in the record, otherwise directs:**

B(1) [*The plaintiff shall concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, shall state defendant's case based upon any defense or counterclaim or both*] **The jury shall be selected and sworn. Prior to voir dire, each party may, with the court's consent, present a brief neutral statement of the facts to the entire jury panel.**

B(2) [*The plaintiff then shall introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise*] **After the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting questions of witnesses if permitted, and the elementary legal principles that will govern the proceedings.**

*Judge Harris, chair; Judge Carp, Judge Dickey, Mr. Johnson, and Mr. McMillan, members.

B(3) [*The parties then respectively may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense, or counterclaim.*] [1]**The plaintiff shall concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, shall state defendant's case based upon any defense or counterclaim.**[1]

B(4) [*When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.*] [2]**The plaintiff shall [then] introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.**[2]

B(5) [*Not more than two counsel shall address the jury in behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours.*] [3]**The parties respectively [then] may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense or counterclaim.**[3]

[1]---[1]This language is identical to existing B(1) except for the omission of "or both" at the end of the sentence.

[2]---[2]This language is identical to existing B(2) except that "The plaintiff shall [then]" is substituted for "The plaintiff then shall . . ."

[3]---[3]This language is identical to existing B(3).

B(6) [*The court shall then charge the jury.*] [4]**When the evidence is concluded, unless case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.**[4]

[5]**B(7) Not more than two counsel shall address the jury on behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours.**[5]

[6]**B(8) After the evidence is concluded, the court shall instruct the jury. The instructions may be given before or after the closing arguments.**[6]

[7]**B(9) With the court's consent, jurors are permitted to submit to the court questions directed to witnesses or to the court. The parties shall be given an opportunity to object to such questions out of the presence of the jury.**[7]

4---[4]This language is identical to existing B(4).

5---[5]This is a new subsection. Its language is identical to existing B(5) except that on lines 50-51 it substitutes "on behalf" for "in behalf."

6---[6]This is a new subsection. Its language corresponds to, but modifies, existing B(6), which states: "The court then shall charge the jury."

7---[7]This subsection and its language are entirely new.

PROPOSAL 2--Alternate juror rule amendments:

A number of proposals have been discussed regarding the method of selecting alternate jurors. The goal is to improve the experience from the juror's perspective. The proposals have principally centered around two

possible new methods for selecting alternate jurors:

1. Do not distinguish between the jurors and alternates until the end of the case. The following language was suggested by the OSB Procedure and Practice Committee for this approach:

> The identity of alternate jurors shall not be determined until the end of the trial. At the time of impanelment, the trial judge shall inform the jurors that at the end of the case, the alternate jurors will be determined by lot in a drawing held in open court.

2. Choose the alternate jurors during jury selection, but don't tell the jurors who the alternates are until the case is handed off to the jury at the end of the trial. The court and counsel would know who they are at the time of selection.

It is recommended that this issue be studied further before being formally considered by the Council.

CIRCUIT COURT OF OREGON
Fifteenth Judicial District

RICHARD L. BARRON
Judge

Coos County Courthouse
Coquille, Oregon 97423
396-3121

May 15, 2000

To: Members, Council on Court Procedures

From: Rick Barron

Re: ORCP 22C(1)

Ben Bloom, Bill Gaylord, and I were assigned to a subcommittee to look at possible changes to the above rule. In a memo last October Maury Holland raised three issues regarding the rule. They are: (1) the 90 day period in which a defendant has to file a third party complaint; (2) the requirement that after the 90-day period the defendant must obtain leave of court even if the plaintiff agrees to the filing of a third party complaint; and (3) a defendant cannot file a third party complaint against a third party if the third party is liable to the plaintiff, but not liable to the defendant.

The subcommittee does not recommend changing the part of the rule allowing a defendant 90 days in which to file a third party complaint as a matter of right. The 90-day period is a reasonable time to allow a defendant to decide whether to file a third party complaint.

The subcommittee did discuss possible changes to the requirement that a defendant obtain both agreement of the parties who have appeared and the court after the 90-day period. The possible changes are numbered 1b and 1c, 2 b and 2c, and 3b and 3c in the attached versions of ORCP 22C(1). Each version also has the possible changes to address the third issue raised in Maury's memo. The consensus of the subcommittee is that no change should be made to the requirement that a defendant must obtain both agreement of the parties who have appeared and the court before filing a third party complaint after the 90-day period. It was felt that the court should not be able to allow the filing of a third party complaint if plaintiff opposed the filing after the 90-day period.

The third issue raised by Maury's memo needs a short explanation. A lawyer told Maury that his client, the defendant, had filed a third party complaint against a party who the defendant felt was liable to the plaintiff. The defendant/third party plaintiff did not allege the third party defendant was or might be liable to the defendant/third party plaintiff as required by ORCP 22C(1). The third party defendant filed a motion to dismiss the third party complaint because it did not allege the third party defendant was or might be liable to the defendant/third party

plaintiff and the court allowed the motion. The lawyer was upset because ORS 18.470(2) appears to allow the trier of fact to compare the fault of any person who may have caused damage to the plaintiff. ORS 18.470(2) is set forth in attachment number 4.

The subcommittee recommends that the third issue raised by Maury's memo be discussed. The possible changes are set forth in the attached versions number 1a, 2a, and 3a with no other proposed changes included. Other than placement of the words, there is really no difference between 1a and 2a. All versions would allow a defendant under ORCP 22C(1) to implead a third party who is independently, but concurrently liable to plaintiff, but not liable to the defendant. As such, the lawyer who called Maury would be allowed to implead the third party and not be subject to a motion to dismiss. There are two questions. First, did the legislature intend to expand the definirion of third party defendants beyond ORCP 22C to include independent, but concurrent tortfeasors when it enacted ORS 18.470(2)? Second, does the Council want to allow a defendant to implead a person who is liable to plaintiff, but not the defendant?

ORCP 22C(1)

After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the **plaintiff or to the** third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

ORCP 22C(1)

After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the **plaintiff or to the** third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared [*and*] **or** leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

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ORCP 22C(1)

After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff **or to the plaintiff** for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

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After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff **or to the plaintiff** for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared [*and*] **or** leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

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After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff **or to the plaintiff** for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain [*agreement of parties who have appeared and*] leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

ORCP 22C(1)

After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff**, or whose partial fault may have combined with any fault of the third party plaintiff to cause the injury of which plaintiff complains,** as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

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ORS 18.470(2)

The trier of fact shall compare the fault of the claimant with the fault of any party against whom recover is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled. The failure of a claimant to make a direct claim against a third party defendant does not affect the requirement that the fault of the third party defendant be considered by the trier of fact under this subsection. Except for persons who have settled with the claimant, there shall be no comparison of fault with any person:

(a) Who is immune from liability to the claimant;

(b) Who is not subject to the jurisdiction of the court;

(c) Who is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose.

MEMORANDUM

TO: Members of the Council on Court Procedures Mavry Holland

FROM: Dan Harris

RE: Jury reform proposals

DATE: April 4, 2000

We will be discussing jury reform proposals at the meeting this Saturday. Attached to this memo are the three proposals we would like to discuss. The proposals include amendments to ORCP 58 and 59 covering the following subjects:

1. Allowing brief neutral statements to be made to the jury panel before voir dire.

2. Allowing jurors to ask questions to witnesses and the court.

3. Encouraging jury instructions to be in writing.

4. Allowing jurors to discuss the case during recesses.

5. Allowing judges to instruct the jury before or after closing arguments.

You will see from the attached memo that there are other proposals we could add to the list if the Council is prepared to do so. I have received some feedback from the OSB Procedure and Practice Committee and the Chief Justice's Civil Law Advisory Committee. These potential changes to the ORCP are scheduled to be discussed at the up coming judicial conference (April 17 and 18). I have also been invited to discuss these proposals at the OADC convention in June and the OTLA convention in August. Last December I was in a judicial conference in San Francisco where I had the opportunity to discuss these concepts with seven trial judges from Arizona. Without exception, they liked the changes and informed me that they had not experienced any problems in the use of these new procedures. Are there any other groups we should be presenting these proposals to for feedback?

At this Saturday's meeting, we are looking for some guidance from the Council as to which proposals to go forward with for the purpose of receiving informal comment and feedback; we also need to establish a time frame for when the Council wants to put the proposals into a form that can be submitted for formal comment.

PROPOSAL TO AMEND ORCP RULES 58 AND 59

PROPOSAL No. 1 - ORCP 58 A and B

It is proposed that ORCP 58 A and B be amended to read as follows:

A. Order on Proceedings on Trial by the Court.

Trial by the court shall proceed in the order as prescribed in subsections (3) through (6) of section B of this rule unless the court for good cause stated in the record otherwise directs.

B. Order of Proceedings on Jury Trial.

The trial by a jury shall proceed in the following order unless the court, for good and sufficient reason stated in the record, otherwise directs:

B. (1) The jury shall be selected and sworn. Prior to voir dire, the parties may, with the court's consent, present a brief neutral statement of the facts to the entire jury panel.

B. (2) After the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions of witnesses and the elementary legal principles that will govern the proceedings.

B. (3) The plaintiff shall then concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, shall state defendant's case based upon any defense or counterclaim.

B. (4) The plaintiff shall then introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.

B. (5) The parties respectively then may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense or counterclaim.

B. (6) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the

plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

B. (7) Not more than two counsel shall address the jury on behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours.

B. (8) After the evidence is concluded, the court shall charge the jury. This may be done before or after the closing arguments of the parties.

B. (9) Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause, the court may prohibit or limit the submission of questions to witnesses.

PROPOSAL No. 2 - ORCP 58 C

It is proposed that ORCP 58 C be amended to read as follows:

The jurors may be kept together in the charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case, they may be admonished by the court that it is their duty not to converse with or permit themselves to be addressed by any person on any subject connected with the trial; except that the jurors shall be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. Notwithstanding the foregoing, the jurors' discussion of the evidence among themselves during recesses may be limited or prohibited by the court upon its motion, or upon motion by a party for good cause.

PROPOSAL No. 3 - ORCP 59

It is proposed that ORCP 59 be amended as follows:

> The court's preliminary and final instructions on the law may be in written form, in which case a copy of the instructions may be furnished to each juror before being read by the court. Upon retiring for deliberations, the jurors shall take with them all jurors' copies of any final written instructions given by the court.

JURY IMPROVEMENT PROPOSALS NOT CONSIDERED AT THIS TIME:

A number of additional proposals have been made regarding improvement of the jury trial process which we believe should not be included with the proposal set forth above. Those additional proposals can be summarized as follows:

1. **Alternate jurors (ORCP 57 F).** It has been proposed that ORCP 57 F be amended to read as follows:

> If all alternate jurors are impaneled, their identity shall not be determined until the end of the trial. At the time of impanelment, the trial judge shall inform the jurors that at the end of the case, the alternate jurors will be determined by lot in a drawing held in open court.

Amending this rule would require the amendment of the rule governing the exercise of peremptory challenges because the current system requires separate challenges for regular and alternate jurors. There are a number of different proposals for how this concern can be addressed. This proposal could be added to the proposals above if the Council can arrive at a consensus for a simple way to amend all applicable rules relating to this change.

Another concern raised is that alternate jurors would be a part of deliberations, if the jurors are allowed to discuss the case during the pendency of the trial. In other words, persons who would ultimately be excused as alternate jurors would be deliberating and have a potential impact on the outcome.

2. It has been suggested that language be added to the appropriate rule which would encourage jurors to ask questions about the final instructions given by the court. A proposal to make this change has not been worked out to date. This proposal could be added to those above if it could be worked out with the Council. It may be covered by the amendment to ORCP 58B (9).

3. It has also been proposed that we consider adopting a rule that would permit post verdict discussion between the parties or their attorneys and members of the jury. This kind of proposal raises numerous questions and could require a significant examination by another committee before a proposal could be submitted to the Council for consideration.

4. It has also been proposed that we consider adopting a rule which would encourage the courts to regularly use juror notebooks. Again, this is a proposal that requires additional scrutiny and feedback before a specific proposal can be developed for consideration.

5. John McMullen has proposed that we work on adopting a standard for writing procedural rules in plain English. I think this is a great suggestion. However, I believe that we should appoint a separate committee on the council to study this proposal as it raises numerous issues that would need to be considered separate from those proposals listed above.

Again, I welcome your comments and feedback, and apologize again for getting this information to you at this late date. We should come prepared to discuss these proposals at the meeting this Saturday. I will then take the proposals on to the Judicial Conference later this month for additional feedback.