AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 10, 1994

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INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 1995 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 1996, unless the Legislative Assembly by statute modifies the action of the Council.

During the 1993-95 biennium, the Council has taken action to correct problems relating to rules promulgated during previous biennia. The comment which follows each rule was prepared by Council staff. Those comments represent staff interpretation of the rules and the intent of the Council, and are not officially adopted by the Council. Subdivisions of rules are called sections and are indicated by capital letters, e.g., A; subdivisions of sections are called subsections and are indicated by Arabic numerals in parentheses, e.g., (1); subdivisions of subsections are called paragraphs and are indicated by lower case letters in parentheses, e.g., (a), and subdivisions of paragraphs are called subparagraphs and are indicated by lower case Roman numerals in parentheses, e.g., (iv).

The amended rules are set out with both the current and amended language. Shading denotes new language while strikeout and brackets indicate language to be deleted.

The Council held public meetings on October 9, 1993, at the Eugene Hilton Hotel in Eugene, Oregon, and at the Oregon State Bar Center in Lake Oswego, Oregon, on the following dates: November 13, 1993, January 15, 1994, April 16, 1994, May 14, 1994, July 16, 1994, August 13, 1994, September 10, 1994, and December 10, 1994.

The Council expresses its appreciation to the bench and the Bar for the comments and suggestions it has received.

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TIME FOR FILING PLEADINGS OR MOTIONS
RULE 15

A. Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a crossclaim [~~of a party summoned under the provisions of Rule 22 D~~] shall be filed with the clerk by the time required by Rule 7 C(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.

B. Pleading after motion.

B(1) If the court denies a motion, any responsive pleading required shall be filed within 10 days after service of the order, unless the order otherwise directs.

B(2) If the court grants a motion and an amended pleading is allowed or required, such pleading shall be filed within 10 days after service of the order, unless the court otherwise directs.

C. Responding to amended pleading. A party shall respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

D. Enlarging time to plead or do other act. The court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or allow any other pleading or motion

after the time limited by the procedural rules, or by an order to enlarge such time.

COMMENT

15 A is amended at the suggestion of the OSB Practice and Procedure Committee to clarify that pleadings or motions responsive to any counterclaims or cross-claims, not merely those by a party joined under ORCP 22 D, must be filed with the clerk within 30 days after service of a pleading containing a counterclaim or cross-claim to which the pleading or motion responds, rather than 10 days after such service as might have been inferred from the prior language of this section. While this section speaks only of filing with the clerk, pleadings and motions responding to counterclaims and cross-claims must, pursuant to ORCP 9 A, also be served upon all other parties who have appeared in the action and not in default.

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

A. Counterclaims.

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

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

B. Cross-claim against codefendant.

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

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

B(3) An answer containing a cross-claim shall be served

upon the parties who have appeared.

C. Third party practice.

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

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

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

D. Joinder of additional parties.

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

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

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

E. Separate trial. Upon motion of any party or on the

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

COMMENT

22 C(1) is amended to confirm the Council's intent regarding the meaning of the prior language. The amendment makes clear that, as with counterclaims and cross-claims generally under the ORCP, counterclaims by third-party defendants against plaintiffs or third-party plaintiffs, and cross-claims by third-party defendants against third-party co-defendants, are all permissive rather than compulsory.

F. Notice and exclusion.

* * * * *

F(2) Prior to the [~~final~~] entry of a final judgment against a defendant the court shall request members of the class who may be entitled to individual monetary recovery to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member who has filed a statement required by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.

F(3) Failure of a class member to file a statement required by the court will be grounds for [~~the~~] entry of judgment dismissing such class member's claim for individual monetary

recovery without prejudice to the right to maintain an individual, but not a class, action for such claim.

* * * * *

COMMENT

32 F(2) is amended to remove uncertainty left by the Council's 1992 amendments to Rule 32, specifically the amendment abolishing the classification of class actions in former section 32 B into three distinct categories. The purpose of the present amendment is to express the Council's intent that the understanding established prior to the 1992 amendments remains that the claim form procedure mandated by this subsection applies only to class actions wherein the relief sought consists of individual monetary recoveries by class members.

32 F(3) is amended for clarity and consistency with subsection 32 F(2) above, as amended.

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.

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 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.

JURORS
RULE 57

* * * * *

C. Examination of jurors. [~~The full number of jurors having been called shall thereupon be examined as to their qualifications. The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant.~~] 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.

* * * * *

COMMENT

57 C is amended to negate any inference that might have been drawn from the prior language of this subsection that the court must allow parties to examine prospective jurors singly as opposed to in panels. The Council intends that the court have broad discretion to regulate the manner in which voir dire is conducted.

TRIAL PROCEDURE
RULE 58

A. Order of proceedings on trial by the court. Trial by the court shall proceed in the order prescribed in subsections (1) through (4) of section B of this rule, unless the court, for special reasons, 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:

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.

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.

B(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.

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.

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.

B(6) The court then shall charge the jury.

C. Separation of jury before submission of cause; admonition. The jurors may be kept together in 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 any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

D. Proceedings if juror becomes sick. If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform the duty of a juror, the court may order such juror to be discharged. In that case, unless an alternate juror, seated under Rule 57 F, is available to replace the discharged juror or unless the parties agree to proceed with the remaining jurors, a new juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

E. Failure to appear for trial. When a party who has filed an appearance fails to appear for trial, the court may, in its

discretion, proceed to trial and judgment without further notice to the non-appearing party.

COMMENT

58 E is added to this rule by transfer from Rule 69, where it formerly appeared as section 69 C. The Council intends no change in meaning, but believes this section more appropriately belongs in this rule, since the latter deals with several aspects of trial procedure.

DEFAULT ORDERS AND JUDGMENTS
RULE 69

A. Entry of order of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default.

B. Entry of default judgment.

B(1) **By the court or the clerk.** The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(1)(a) The action arises upon contract;

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can be computation

be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person as defined by ORS 126.003(4) and such fact is shown by affidavit;

B(1)(e) The party seeking judgment submits an affidavit of the amount due;

B(1)(f) An affidavit pursuant to subsection B(3) of this rule has been submitted; and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D(3)(a)(i), 7 D(3)(b)(i), 7 D(3)(e) or 7 D(3)(f).

B(2) **By the court.** In all other cases, the party seeking a judgment by default shall apply to the court therefore, but no judgment by default shall be entered against a minor or an incapacitated person as defined by ORS 126.003(4) unless the minor or incapacitated person has a general guardian or is represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems

necessary and proper. The court may determine the truth of any matter upon affidavits.

B(3) **Amount of judgment.** The judgment entered shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B(4) **Nonmilitary affidavit required.** No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article I of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

~~[C. Failure to appear for trial. When a party who has filed an appearance fails to appear for trial, the court may, in its discretion, proceed to trial and judgment without further notice to the non-appearing party.]~~

[D]C. Setting aside default. For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B and C.

[E]D. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.

[F]E. "Clerk" defined. Reference to "clerk" in this rule

shall include the clerk of court or any person performing the duties of that office.

COMMENT

Former **69 C** is deleted from this rule and transferred to Rule 58 as section 58 E. Sections have been re-lettered accordingly.