STOEL RIVES BOLEY JONES & GREY

MEMORANDUM

January 28, 1992

TO: FRED MERRILL
COUNCIL ON COURT PROCEDURES

FROM: KAREN K. CREASON

RE: Rule 55: Discovery of Hospital Records

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

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

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

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

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

Karen K. Creason

cc: Mr. Dan Field, Oregon Association of Hospitals

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

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

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

H.(2) Certification in lieu of appearance:

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

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

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

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

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

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

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

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

H (3) Personal attendance of custodian . . .

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

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

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

H(4). Tender and payment . . .

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March 16, 1992

Oregon Association of Hospitals
Bldg. 2, Suite 100
4000 Kruse Way Place
Lake Oswego, OR 97035

COPY

Gentlemen:

Hospitals, clinics, and individual physicians in the state of Oregon are regularly required to incur expense and inconvenience because of the present practices of obtaining medical records for purposes of litigation. A simple change in the Oregon Rules of Civil Procedure could significantly reduce that workload.

Whether the claim has resulted from a motor vehicle collision, a defective product, or professional negligence, the parties require accurate and complete copies of the medical records.

At the present time it is common for plaintiff's counsel to obtain some or all of the medical records before an action is filed. Once the suit is filed, each defendant normally seeks, through a subpoena duces tecum, to obtain another complete record. Then at or prior to trial another subpoena will usually be issued requiring the medical provider to deliver a third set of records for the trial. In some cases I've seen, the medical provider has been required to produce the same set of records as many as 7 times.

To reduce the inconvenience and expense imposed upon the medical providers, I have for many years urged opposing counsel to cooperate and to obtain the records only one time. The procedure is to subpoena one set of the records early on and have that copy delivered in a sealed envelope, in response to the subpoena, to a certified court reporter. The court reporter then makes true copies for each of the litigants and retains the original copy furnished by the medical provider, in a sealed envelope for trial. Not only does this practice obviate repeated inconvenience and expense to the medical provider, it is also more convenient and less expensive for the litigants.

I have been frustrated however, in that I find that only

occasionally will opposing counsel agree to such a procedure. Rather, each attorney tends to want to seek his or her own set of records.

I am proposing to the Council on Court Procedure that the Oregon Rules of Civil Procedure be amended specifically providing for such a procedure. Once an action is filed, any of the litigants has a right to subpoena a copy of the records. But the subpoena would require that the set of records provided by the medical provider, in response to the subpoena, not simply be sent to the office of the attorney issuing the subpoena, but rather, go to a court reporter. The reporter would make a record of having received the medical records in a sealed envelope and duly provide a true copy thereof to each litigant entitled to a copy. The reporter would then preserve the original set of records in a sealed envelope to be used as the trial exhibit.

While I have on some occasions persuaded opposing counsel to follow this procedure, and it has worked without a hitch, and with savings to all involved, I continue to be frustrated that many counsel are unwilling to so cooperate. I am troubled about the additional expense, the waste of paper, and waste of time that results.

Our office will be presenting a proposal to the Council on Court Procedure that promulgates amendments to the Oregon Rules of Civil Procedure and we suggest that your respective organizations consider the proposal and lend support.

If you or representatives of your respective organizations have any interest in discussing the matter or helping to refine the proposal, I would be pleased to hear from you.

Sincerely,

Arthur C. Johnson

ACJ/ng
cc: Jan Baisch
Jeff Foote
Larry Wobbrock
Charlie Williamson

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March 20, 1992

Arthur C. Johnson
975 Oak St Ste 1050
Eugene OR 97401-3176

Dear Mr. Johnson:

I have reviewed your 3/16/92 letter in which you purpose to modify the Oregon Rules of Civil Procedure to delineate a new process by which medical records will be distributed to litigants once an action is filed.

In a review with our Medical Records department we feel that your proposal has merit and would like to suggest that you also include patient billing information as this also seems to be a high demand item at the time litigation is initiated.

If we can be of any assistance please contact me at 686-7243.

Sincerely,

James M. Lemieux

James M. Lemieux
Director, Risk Management

rb

HC

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March 25, 1992

Kent Ballentine
Oregon Association of Hospitals
4000 Kruse Way Place
Lake Oswego, OR 97035

COPY

Dear Kent:

Thank you for your phone call in response to my letter of March 16. I also received a response from James M. Lemieux of Sacred Heart General Hospital. Mr. Lemieux agreed with the general idea contained in my proposal and suggested that it be broadened to include patient billing information.

Michael Phillips of our office is a member of the Council on Court Procedure. He advises that a proposal accomplishing at least part of this proposal will be before the Council on Court Procedure at its meeting to be held in Eugene, Saturday, April 11, at 9:30 a.m. The meeting will be held at the University of Oregon Law School.

Meetings of the Council are open to the public and I would suggest that you or representatives of the Oregon Association of Hospitals, as well as others interested in such a reform, be present to express their views.

If you want any specific information concerning the pending proposal or the procedures that will be followed by the Council at its meeting on April 11, you may wish to contact the chair of the Council, Henry Kantor, 226-3232. We have asked that this matter also be put on the May agenda for the Council as that meeting will be held in Portland, and may be more convenient. You can also contact Mr. Phillips of our office. I'm sure either would be willing to confer with you and share such information.

Sincerely,

Arthur C. Johnson

ACJ/ng
cc: Mel Pyne, McKenzie-Willamette Hospital
James M. Lemieux, Sacred Heart General Hospital
Henry Kantor
Jan Baisch
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Oregon
Association of
Hospitals

April 13, 1992

Mr. Arthur C. Johnson
Johnson Clifton Larson & Bolin, P.C.
975 Oak St., Suite 1050
Eugene, OR 97401-3176

Dear Mr. Johnson:

Since your letter of March 16, 1992 and our subsequent phone conversation, I have gathered information and opinion on the procedures for obtaining medical records. The issue is complex, and your proposed solution leaves a number of questions unresolved. These include:

- The manner in which the records of litigants receiving ongoing treatment would be forwarded to the court; and,

- A procedure for protecting records which contain information that is not pertinent to the case at issue, and is protected from release by state or federal law. If the hospital does not control access to the record, it cannot fulfill its legal responsibility to limit release of the record to authorized parties.

In addition to these specific questions raised by your proposal, a number of related issues have been raised by others who work with these record requests on a regular basis. I believe it would be appropriate to consider all of these issues concurrently with any effort to modify ORCP 44 and/or 55. Rather than asking the Council on Court Procedures to consider individual proposals in a vacuum, I recommend that the Council sponsor a multidisciplinary task force to undertake a comprehensive review of the rules governing the subpoenaing of medical records. Such a group might include attorney's from the plaintiff's and defense bar, along with representatives from the Oregon Medical Records Association, the Oregon Medical Association, and the Oregon Association of Hospitals. I hope you will join me in urging the Council on Court Procedures to consider sponsoring such an effort.

Thank you again for the opportunity to respond to your proposal. I look forward to working with you on this issue.

Sincerely,

G. Kent Ballantyne
Senior Vice President

c: Mel Pyne, McKenzie-Willamette Hospital
James M. Lemieux, Sacred Heart General Hospital
Henry Kantor

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April 23, 1992

Mr. Henry Kantor
Pozzi, Wilson, et al
1400 Standard Plaza
1100 SW 6th Avenue
Portland, OR 97204

Dear Henry:

I have received several letters concerning proposals to modify the procedure for subpoenaing hospital records. The issue was originally brought up when Karen Creason raised the issue of whether the modified subpoena procedure under ORCP 55H was the exclusive procedure under which hospital records could be subpoenaed. That was followed up by a letter from Art Johnson suggesting an alternative to the 55H procedure. It is also my understanding that the Council on Court Procedures as well as the Procedure and Practice Committee of the State Bar are looking into this matter.

I received a copy of G. Kent Ballantynes letter addressed to Art Johnson dated April 13, 1992 suggesting that before any changes are made a multidisciplinary task force be put together to study the issues surrounding the subpoenaing of the hospital records. Quite candidly my experience has been that trial lawyers engaged in personal injury litigation either on behalf of the plaintiff or defendant are generally unappreciative and do not understand the problems that hospitals have in disclosing their records. There are constraints under both state and federal law as well as the risk of litigation by patients for inappropriate disclosure of hospital records. Given those facts I would hate to see any changes made without an opportunity for the Oregon Association of Hospitals, the Oregon Medical Records Association, the Oregon Medical Association and the Oregon Society of Hospital Attorneys participating in that process. As a result I believe Mr. Ballantynes suggestion is a good one and should be considered.

Please call if you have any questions.

Very truly yours,

THORP, DENNETT, PURDY
GOLDEN & JEWETT, P.C.

Laurence E. Thorp

LET/cam
cc: Dan Fields
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April 26, 1992

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Mr. Arthur C. Johnson
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975 Oak Street
Eugene, OR 97401-3176

Re: Council on Court Procedures
Proposed ORCP 45 and 55 Amendments

Dear Larry and Art:

Reference is made to your recent letters regarding the proposals to modify the procedure for subpoenaing hospital records and to the related letters from James M. Lemieux of the Sacred Heart General Hospital and G. Kent Ballantyne of the Oregon Association of General Hospitals. I apologize for not getting back to you sooner. However, with the passing of Fred Merrill, Executive Director of the Council, things have slowed down some.

It is clear that the issues originally raised by Karen Creason have led to significant comments and ideas. The Council has not even attempted to deal with them yet this biennium, although the "subject" is on the agenda for our next meeting, on May 9 at the Oregon State Bar Center in Lake Oswego. My concern is that the "subject" is only in the process of being defined, not resolved.

It is apparent from previous meetings that the Council generally shares the suggestion voiced by Larry and Mr. Ballantyne that any modification of existing procedure not take place in a vacuum but rather with the benefit of contributions from the plaintiff and defense bars, the Oregon Medical Association and other groups with valid interest in the subject.

The only action taken by the Council to date has been to make sure that interested persons were aware of the proposal and had the opportunity to be heard.

Given these events, I intend to generally report to the Council on this subject at the May 9 meeting and to state that the subject will be on the agenda for a full public hearing at the June 13 in Ashland. Please let me know promptly if this will present any problem.

Thank you for your time and interest.

Very truly yours,

HENRY KANTOR

Henry Kantor

[Enclosure for Mr. Johnson only: Mr. Thorp's April 23 letter]

cc: Mr. John E. Hart
Prof. Maury Holland
Ms. Karen Creason
Mr. James M. Lemieux
Mr. G. Kent Ballantyne
Mr. Jan T. Baisch
Mr. Lawrence Wobbrock

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June 3, 1992

Maurice J. Holland
Executive Director
Council on Court Procedures
School of Law
1101 Kincaid Street
Eugene, OR 97403-1221

Dear Mr. Holland:

Thank you for your letter of May 26, 1992. I reviewed the changes to ORCP 55H recommended by Fred Merrill in his memorandum to the Council dated March 12, 1992. I believe it adequately deals with the problem previously raised concerning the use of subpoenas duces tecum to obtain hospital records other than in relation to a hearing. The practical problem it creates, however, is the need to set depositions in order to obtain hospital records. Some attorneys will object to that requirement. My recollection is 55H(2)(b)(iv) was added for the express purpose of obviating the necessity of scheduling depositions simply to obtain hospital records.

In addition, that subdivision was added to ensure that litigants did not attempt to obtain hospital records through some type of request for production or notice procedure. In some cases litigants' attorneys send letters to hospitals demanding that records be provided. Because of various restrictions provided by state and federal regulations, however, hospital records often times can not be released without a court order. A subpoena qualifies as a court order in most cases. Therefore, 55H(2)(b)(iv) provides for a subpoena.

I do not know how frequently litigants attempt to subpoena hospital records other than in conjunction with a deposition, hearing or trial. I suspect, however, it is not frequently done. If that is the case, I see no problem with the changes proposed by Professor Merrill and I believe the changes adequately address the concerns which have been raised.

I will be unable to attend the meeting in Ashland. Please provide me with a copy of the minutes so I can see what occurs with respect to this matter.

Very truly yours,

THORP, DENNETT, PURDY
GOLDEN & JEWETT, P.C.

Laurence E. Thorp

LET/cam
cc: Henry Kantor
Dan Fields
Kurt Hansen
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Rule 55

July 30, 1992

VIA FACSIMILE AND REGULAR MAIL

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

Re: Council on Court Procedures 6-13 Meeting

Dear Mr. Kantor:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

DENNIS JAMES HUBEL

DJH:sb

cc: Karen Creason
Stephen Thompson
Maurice J. Holland

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JOHN E. HART

August 17, 1992

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Re: Council on Court Procedure

Dear Karen and Larry:

I wanted to advise you that the Council on Court Procedure voted to not make piecemeal changes to Rule 55 regarding hospital records at its Saturday meeting, August 1, 1992. The majority of the Council, as well as the Practice and Procedure Committee of the Oregon State Bar, feels that we should develop a small task force next year to solve the global problems of Rule 55 as well as current difficulties obtaining hospital records. Naturally, everyone connected with the Council appreciates your input and hopes that you will assist us in our continuing effort with regard to ORCP 55.

I will look forward to hearing from you.

Best personal regards,

John E. Hart

cc: Henry Kantor
Maurice Holland