COUNCIL ON COURT PROCEDURES

Saturday, March 14, 1992 Meeting
9:30 a.m.

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

A G E N D A

1. Approval of minutes of meeting of February 8, 1992

2. Six-person jury (Ron Marceau) (Hon. Owen M. Panner and Hon. Kurt C. Rossman)

3. Summons warning - progress report (Judge Welch)

4. Limiting secrecy in personal injury actions (proposal by OADC and OTLA)

5. Subpoenas without trial or deposition and hospital records (Executive Director and Karen Creason)

6. Oaths for deposition by telephone (Mike Phillips and Bruce Hamlin)

7. **NEW BUSINESS**

NOTE: The subcommitee reports on exclusion of witnesses at deposition and class actions will be on the agenda for the Council meeting to be held April 11.

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of February 8, 1992

State Capitol, Room 350
Salem, Oregon

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

(Also present were Attorneys Phil Goldsmith, Dennis Hubel and Jim Vick. Gilma Henthorne was also present.)

The meeting was called to order by Chair Henry Kantor at 9:30 a.m.

The Chair announced that the meeting was an advertised public meeting and invited those members of the public present to make any statements they wished to make during the meeting.

The Chair stated that Fred Merrill was at the Mayo Clinic in Rochester, Minnesota attending to health problems. He said that flowers had been sent to Fred, expressing very best wishes from all the Council members.

Agenda Item No. 1: Approval of minutes of meeting held December 14, 1991. The minutes of the meeting held December 14, 1991 were unanimously adopted.

Agenda Item No. 2: Oaths for depositions by telephone (subcommittee report - Mike Phillips and Bruce Hamlin; letters from Kathryn Augustson and Stephen Thompson; see pages 1 and 2 of Executive Director's January 27, 1991 memorandum). Mike Phillips

explained that at the last meeting a proposal to amend subsection 39 C(7) had been discussed and concerns had been raised by Council members. The subcommittee, after discussion with Kathryn Augustson of the OSB Procedure and Practice Committee, is now suggesting the amendments to ORCP 39 C(7) and G(1) set out on pages 1 and 2 of the Executive Director's January 27, 1992 memorandum. A motion was made and seconded to adopt those proposed amendments. A lengthy discussion followed.

Bernie Jolles questioned the meaning of the language contained in the last sentence of proposed C(7)(b) which said:

> "If the place where the deponent is to answer questions is located outside this state, motions to terminate or limit examination under section E of this rule may only be made to the court in the state in which the action is pending and other applications for orders, subpoenas, and sanctions may be made to the court in the state in which the action is pending or a court of general jurisdiction in the county of the state where the deposition is being taken."

Bernie Jolles thought this dealt with a situation where an action is pending in Oregon and a deponent located in a foreign jurisdiction is being deposed. He suggested that, in the second from the last line above, the words "deposition is being taken" be deleted and the words "where the deponent is located" be substituted, Several other suggestions were made by Council members.

The Chair stated that he thought the intent of the last sentence of C(7)(b) should be clarified.

Janice Stewart stated she had a problem with reference to "county" in the last sentence of C(7)(b) since some states do not have counties. A suggestion was made that the wording should be "a court of general jurisdiction of the state where the deposition is being taken". Janice Stewart said it was still unclear where the deposition is being taken and that it could be where you are asking the questions or where the questions are being answered. It was pointed out that in the fourth sentence of C(7)(b) at the bottom of page 1, it states: "For the purposes of this rule ... depositions taken by telephone are taken at the place where the deponent is ...". Judge Liepe suggested that the language prefacing the last sentence of C(7)(b) could read, "If the deponent is located outside this state, ..." Janice Stewart suggested that "where the deponent is located" could be substituted for "where the deposition is being taken" at the end of the last sentence of C(7)(b). The Chair suggested that, to track the preceding sentence, the language "If the place of

examination is outside the state" could be substituted for the proposed language in the last sentence of C(7)(b).

Judge Kelly wondered whether there really was an issue regarding out-of-state depositions by telephone. Bruce Hamlin explained that the rule as written requires a court order to conduct one. Bruce said the proposed rule makes it clear that parties can informally take an out-of-state deposition by telephone and tells the court reporters that it is all right to administer an oath over the telephone.

The Chair asked for comments regarding the first three sentences of C(7)(b). Judge Kelly felt that the third sentence of C(7)(b) repeated what is said in the first two sentences of C(7)(b). After further discussion, a motion was made and seconded to delete the third sentence from 39 C(7)(b). The motion passed unanimously.

The Chair asked for comments regarding whether the fourth sentence of C(7)(b) was needed since it is a definitional sentence. A motion was made and seconded to delete the fourth and fifth sentences from C(7)(b). Judge Liepe pointed out that it had been felt necessary to incorporate some language from the federal rule to address matters not addressed by the Oregon rule. Mike Phillips said the subcommittee wanted to try to give directions to the judges as to what they could rule upon, and Janice Stewart agreed that there needed to be some basis for rulings in Oregon. A vote was taken on the motion to delete the fourth and fifth sentences; the motion failed with 4 in favor and 9 opposed.

A motion was made and seconded to delete the words "in the county" from the second to the last line of the fifth sentence in C(7)(b). The motion passed unanimously.

Janice Stewart suggested amending the end of the fourth sentence so that it would say "where the deponent is located" instead of "where the deponent is to answer questions propounded to the deponent" and, at the beginning of the fifth sentence, she suggested saying "If the deponent is located" instead of "If the place where the deponent is to answer questions is located ...". A motion was made and seconded to adopt that language. Further discussion followed. Judge Liepe suggested amending the fourth sentence by saying "... place of the examination under Rule 55 F(2) is deemed to be the place where the deponent is located at the time of the deposition." Bill Cramer suggested deleting the language at the beginning of the fifth sentence, "If the place where the deponent is to answer questions is located outside this state" and begin the sentence with "Motions to terminate ..."

The Chair suggested that the subcommittee take another look at the draft, in particular, the fourth and fifth sentences of

C(7)(b), and perhaps find a way of shortening them up. The Chair, referring to the language in C(7)(a), questioned whether a stipulation would be limited to the parties and whether there should be a concern about a witness needing to stipulate. Bruce Hamlin said he thought it was intended to apply to a stipulation of the parties. A discussion followed and it was suggested the last sentence of C(7)(a) was not needed. A motion was made and seconded to delete the last sentence of C(7)(a); the motion passed unanimously.

The Chair asked if there were further comments regarding the motion as modified to adopt both C(7)(a), except the last sentence, and the first two sentences of C(7)(b). The last two sentences are to be redrafted and submitted for consideration at the next meeting. Attorney Jim Vick expressed concern that someone might forget to put a stipulation on the record, which would present problems at trial; he thought there should be language that would address that issue. The Chair asked the subcommittee to try to come up with some language.

A motion was made, seconded, and unanimously passed to table the motion to adopt 39 C(7)(a) and 39 C(7)(b) until the Council could consider the subcommittee's redraft of the proposed amendments.

Agenda Item No. 3: Exclusion of witnesses at depositions (Janice Stewart). Janice Stewart said the draft set out on page 4 of the Executive Director's memorandum specified those who could be present at depositions and that unless the court orders otherwise, only those people may be present. She said subsection (1), which states that attorneys can always be present during deposition, was not taken out of ORE 615 but that subsections (2) and (3) were taken out of ORE 615. A discussion followed.

Judge Liepe wondered whether an expert whose deposition was next could listen in on a deposition; Janice Stewart said that a court order would have to be obtained or the parties would have to agree to it. Bernie Jolles wondered whether the witness would be able to have an attorney present. Janice Stewart suggested including language specifying "attorneys of any of the parties or the deponent".

The Chair suggested, to be consistent with the Council's approach in other rules, prefacing the second sentence of the draft with, "Unless the parties stipulate or the court orders otherwise," rather than "Unless the court orders otherwise,". Janice Stewart agreed to make that change also.

The Chair pointed out that ORE 615 has two categories which the proposed amendment to 39 D does not contain: a victim in a criminal case and a person whose presence is shown by the party to be essential to the presentation of the parties' cause, which

would include expert witnesses and representatives of non-natural persons. He asked whether the intent was that one cannot bring an expert or a second corporate representative without either the parties' stipulation or a court order. Janice Stewart said the thought was that it was better not to have that specified in the rule and to leave it up to the parties to stipulate or the court to order otherwise. Judge Liepe wondered which would be the better approach: to say a court order is needed to exclude witnesses or that a court order is needed to let them be there. Janice Stewart stated the reason the rule was brought to the Council's attention was the problem currently with the court's authority under the rule that limits depositions. Mike Phillips felt that to have a rule which automatically excluded everyone from a deposition except a limited number of people went far beyond the initial concerns. Bernie Jolles stated that another issue had been raised and that was the intimidation question. Judge Kelly wondered whether or not legal assistants would be allowed to attend a deposition. Further discussion followed.

Attorney Dennis Hubel, speaking on behalf of the OSB Procedure & Practice Committee, stated he thought the amendment to ORCP 39 D as drafted provides a mechanism to limit it to a corporate representative and that would need interpretation if someone wanted to press the issue. He was in favor of leaving it up to the judge to decide how many corporate representatives could attend a deposition.

Judge Barron suggested that the word "exclusion" be added so that the first sentence would be prefaced by: "Examination, cross-examination and exclusion of witnesses may proceed ...".

The Chair asked whether the intent of the draft was to exclude the remainder of existing Rule 39 D. Janice Stewart stated that was not the intent and that perhaps it would be better to break the rule up into subsections.

Judge Barron raised another point: definition of parties. He wondered whether beneficiaries in a wrongful death action would be allowed to be present at a deposition.

The Council discussed whether adding the word "exclusion" would accomplish the intent of the amendment. Janice Stewart said the problem was that ORE 615 is taken directly from the federal rule and that there are federal cases that go both ways as to whether that rule applies to depositions. Bruce Hamlin said that if the concern was that by just adding the word "exclusion" to the first sentence of 39 D does not make it clear that the court has the power, a single sentence after the first sentence of existing 39 D could be added: "At the request of a party or a witness, the court may order persons excluded from the deposition."

The Chair asked for comments on the proposed language, "Examination, cross-examination, and exclusion of witnesses may proceed in the manner as permitted by trial," and adding the existing language in 39 D., with perhaps a reference back to Rule 36 C(5) to take care of the intimidation problem. Janice Stewart stated it would mean that you are only going to be excluding people who are witnesses and then the issue would be who are witnesses; she thought it would be a problem to simply refer to ORE 615 because it is not always clear at deposition who will be a witness at trial.

A motion was made and seconded to add the following language following the first sentence of existing 39 D: "At the request of a party or a witness, the court may order persons excluded from the deposition." A discussion followed regarding whether the sentence should be prefaced with "Upon motion". Maury Holland said he thought that people on all sides of a case want to have stated in the rule the category of people who will be present at deposition. Janice Stewart wanted to make sure that the amendment would not merely incorporate Rule 36 C, i.e. that it should be broader than Rule 36 C.

A vote was taken on Bruce Hamlin's motion to add the following sentence after the first sentence of existing 39 D: At the request of a party or a witness, the court may order persons excluded from the deposition." The motion passed with 10 in favor and 3 opposed. Judge McConville said he was in favor of establishing categories and that was why he voted against the motion.

Agenda Item No. 4: Limiting secrecy in personal injury actions (John Hart). The Chair stated that John Hart had asked him to report that representatives of both the OADC and OTLA had been meeting and discussing a proposal which they hoped to present to the Council at its March meeting. The Chair understood that the discussions were along the lines of the bill which had been presented to the legislature during the last session with some changes. No comments were made, and the Chair said it would be placed on the agenda for the next meeting.

Agenda Item No. 5: Class actions (subcommittee report - Janice Stewart). A letter from Attorney Phil Goldsmith dated February 7, 1992 had been distributed at the meeting and is attached to these minutes. The letter presents a summary of the proposed changes to ORCP 32 which had been prepared by the Committee to Reform Oregon's Class Action Rule.

Janice Stewart said the subcommittee had conferred by phone the week before; they thought Mr. Goldsmith had made a very fine presentation. She said Mr. Goldsmith believed that the proposals he was making are not the same as those that created obstacles ten years ago when the rule was enacted. Considering the other

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

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

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

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

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

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

7 E. The motion passed unanimously.

Agenda Item No. 9: Summons warning (Judge Welch). The Chair reminded the Council that at one of the Council's earlier meetings there was a discussion on whether to amend the rule which dictates what language is contained in a summons. The Chair stated it would be placed on the agenda for the March meeting.

NEW BUSINESS

The Council discussed the December 19, 1991 letter from Hugh Collins proposing a change to Rule 54 A(1) (letter attached to Executive Director's memorandum). The Chair stated Mr. Collins had identified the problem concerning plaintiffs who file amended complaints and then drop defendants in their amended complaint. After discussion, the Council decided that it would take no action.

The Council next briefly discussed Ron Bailey's January 7, 1992 letter (also attached to the memorandum) regarding six-person juries. The Chair stated that Ron Marceau had been spearheading this issue for the Council and that Ron Marceau was making arrangements to have at least two judges speak before the Council on the subject. The Chair also said that the Chief Justice had asked for an opportunity to make a presentation on the issue. The Chair thought the six-person jury issue should be placed on the Council's March agenda.

The meeting adjourned at 11:45 a.m.

Recorder:

Gilma J. Henthorne

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February 7, 1992

Mr. Henry Kantor, Chair
Council on Court Procedures
Pozzi, Wilson, Atchison, O'Leary & Conboy
1100 S.W. Sixth, 14th Floor
Portland, Oregon 97204

Re: Proposed Revisions to ORCP 32

Dear Henry:

The Committee to Reform Oregon's Class Action Rule transmitted proposed changes in ORCP 32 to the Council on Court Procedures in December. We have concluded that a summary of our proposals may be of benefit to the Council. I have provided copies for each member.

Class actions are designed to avoid the repeated adjudication of common questions of fact and law, thus saving court time. They also permit claims too small to be pursued individually, to be litigated on behalf of all injured. In Oregon, as elsewhere, class actions have enabled consumers and others to vindicate rights that otherwise would have gone unremedied. See, e.g., Derenco, Inc. v. Benj. Franklin Federal Savings and Loan Association, 281 Or 533, 577 P2d 477, cert denied, 439 US 851 (1978) (requiring lender to pay borrowers the earnings generated by their tax and insurance reserves).

Existing requirements in ORCP 32, however, sometimes impede cases from being decided on their merits and reaching fair outcomes. Our proposal is designed primarily to seek reform in two areas.

1. **Class Certification Standards.** At present, ORCP 32 B creates three types of class actions with widely varying standards. Whether a case can proceed as a class action, at what cost and on what terms, depends on what class action type is found applicable, not on the interests at stake in the case.

The greatest practical consideration is that of giving notice. If mailed notice to each class member is required, postage and processing costs may exceed $1.00 per person.

Under the existing rule, notice (and the opportunity to opt out) must be given in any lawsuit seeking damages. This is so even if a few dollars are at stake for each class member.

However, in an injunctive relief case, notice and the opportunity to opt out presently are discretionary with the court. Thus, even when there are significant and potentially divergent interests at stake, such as in a school desegregation case which will affect the education of all children for years to come, it is not mandatory that class members be given notice.

This is not a problem unique to Oregon. At the national level, there have been several proposals to revise the federal class action rule so that such procedural choices will turn on the interests involved in a particular case, rather than on the form of the action. The revisions we propose are drawn from recommendations made by the ABA Section on Litigation, which presently are before the Advisory Committee on Federal Rules.

2. **Damage calculations.** In Oregon, unlike all other jurisdictions, when a class action is successful, only those individuals who return claim forms share in the judgment. The wrongdoer keeps the rest. For example, in Derenco, the defendant kept more than $1.3 million of illegally obtained profits.

There was strong support in the last legislature for requiring the unclaimed portion of any class action judgment to be paid to the common school fund. To fully implement this policy of transferring unclaimed funds from wrongdoers to the state, the claim form requirement has to be eliminated.

One factor which presently influences the extent of the recovery received by class members is whether damages are precalculated by the defendant or have to be determined by class members from their own records. As is shown in Emerson, "Oregon Class Actions: The Need for Reform," 27 Will L Rev 757 (1991), uncertainty on this point caused plaintiff's counsel in at least one major class action to conclude the class would be better off settling the case on very modest terms.

Our proposal eliminates both problems. It ensures that damages will be computed by the court without having to use class members' records, and that the entire unclaimed recovery will be available for transfer to the common school fund.

Sincerely,

Phil Goldsmith

STOEL RIVES BOLEY JONES & GREY

M E M O R A N D U M

January 28, 1992

TO: FRED MERRILL
COUNCIL ON COURT PROCEDURES

FROM: KAREN K. CREASON

RE: Rule 55: Discovery of Hospital Records

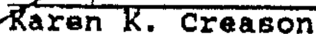
As you know from our prior conversations, I represent the Hospital Association, and in that capacity had occasion to review last year's changes to Rule 55. I am concerned that the changes made to Rule 55 to allow compelled production of nonparty records by subpoena, unrelated to any trial, hearing or 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 <u>exclusive</u> means of subpoenaing hospital records; (2)

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

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



Karen K. Creason

cc: Mr. Dan Field, Oregon Association of Hospitals

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

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

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

H.(2) Certification in lieu of appearance:

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

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

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 . . .