COUNCIL ON COURT PROCEDURES

Minutes of Meeting of February 8, 1992

State Capitol, Room 350
Salem, Oregon

Present:	Richard L. Barron	John V. Kelly
	Susan G. Bischoff	Richard T. Kropp
	William D. Cramer	Winfrid K.F. Liepe
	Bruce C. Hamlin	Robert B. McConville
	Lafayette Harter	Michael V. Phillips
	Maury Holland	Charles A. Sams
	Bernard Jolles	Janice M. Stewart
	Henry Kantor	
Excused:	Richard C. Bemis	R.L. Marceau
	Paul J. DeMuniz	William C. Snouffer
	Susan Graber	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, 1992 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

January 27, 1992

M E M O R A N D U M

TO: MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill, Executive Director

RE: Agenda items for February 8, 1992 Council meeting

The following are some tentative drafts and discussion relating to items on the agenda for the February meeting (listed by agenda number):

2. **Oaths for depositions by telephone:**

After discussion with Kathy Augustson from the State Bar Procedure and Practice Committee, the subcommittee on oaths for depositions by telephone suggests the following amendments to ORCP 39 C(7) and G(1):

ORCP 39 C(7) **Depositions by telephone.**

C(7)(a) The parties may agree by stipulation or [T]the court may upon motion order that testimony at a deposition be taken by telephone[,]. [in which event] If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone pursuant to stipulation between the parties, such stipulation shall be made a part of the record by the party taking the deposition. Acceptance of a stipulation as provided in this subsection constitutes a waiver of any objection to the taking of a deposition by telephone.

C(7)(b) The oath or affirmation may be administered by an officer or person authorized to administer oaths as provided in Rules 38 A or 38 B. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition. If the deponent is not physically in the presence of the officer or person administering the oath, the oath shall have the same force and effect as if the deponent were physically present before the officer. For purposes of this rule, for determining the place of examination under Rule 55 F(2), for

securing attendance of a deponent under Rules 38 B and 55 C(1), or relating to motions for sanctions for failure to be sworn or answer questions at a deposition under Rules 46 A(1) and 46 B(1), depositions taken by telephone are taken at the place where the deponent is to answer questions propounded to the deponent. 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.

ORCP 39 G(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was duly sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness.

This redraft of ORCP 39, approved by the subcommittee, relating to depositions by telephone, attempts to incorporate suggestions from the State Bar Procedure and Practice Committee and made by Council members at the last meeting.

Paragraph 39 C(7)(a) was suggested by the Procedure and Practice Committee and relates to stipulations for depositions by telephone. We changed the language in paragraph C(7)(a) to provide that the party taking the deposition, not the person administering the oath, has the responsibility of getting the stipulation in the record. This is more consistent with the overall approach of Rule 39. We also changed the words "telephonic transmission of testimony" to "taking of a deposition by telephone". The subcommittee also changed the proposed language to make clear that the stipulation in the record need not cover all of the details relating to taking the deposition.

Paragraph 39 C(7)(b) deals with three questions: (1) who can administer the oath for a deposition by telephone? (2) physically how is that accomplished? and, (3) for purposes of compelling attendance and participation of a non-party witness, where is the deposition being taken?

On the first question, the description of who could take the deposition in the first draft did not clearly mesh with ORCP 38. The first sentence of this draft says that, at the option of the person taking the deposition, the oath may be administered either under ORCP 38 A or 38 B. In other words, when the deponent is physically outside this state, for purposes of administering the

oath, the person taking the deposition can treat the deposition as one taken either in this state or outside the state. The second sentence addresses the second question and says that the deponent may or may not be in the physical presence of the deponent. The third sentence of the paragraph makes clear that lack of physical presence does not change the validity of the oath.

The last two sentences of the paragraph deal with the question of location of the deposition in terms of: (a) what limitations are there on travel by the deponent and (b) what court must be used to compel attendance or participation in the deposition?

Relating to travel by the deponent, the draft contains the same limit as any deposition taken outside the state. A non-party foreign deponent can only be forced to appear where he or she is served with a subpoena or where the court orders.

The draft follows the federal rule and, for a foreign non-party witness, says that a court in the state where the deponent is located may issue the subpoena, order participation, and issue sanctions for non-appearance and non-participation. As a practical matter this is the only possible approach. The Oregon Court, where the case is pending, cannot issue a subpoena or an order to a non-party witness that has a binding effect outside the state. Only a court in the state where the deponent is located can effectively order the deponent to testify and punish a deponent for failure to testify. This assumes cooperation of the foreign court either through the Uniform Foreign Deposition Act or comity in response to a commission or a letter rogatory (covered by ORCP 38 B).

For purposes of an order limiting the deposition, however, the rule differs from the federal rule and limits such orders to the Oregon court where the case is pending. This is more convenient for the local party taking the deposition and avoids having a foreign court, unfamiliar with Oregon practice, rule upon the availability of discovery in a case pending in Oregon. It could subject the deponent or other objecting party to the burden of traveling to a foreign court.

The last sentence of the proposed paragraph also deals with the proper foreign court to be used. ORCP 46 and 55 use language more appropriate for depositions being taken in another county in Oregon rather than outside the state. They refer to sanctions and orders by circuit and district courts in the county were the deposition is being taken. Courts in other jurisdictions will have different names and jurisdiction than Oregon Circuit and District Courts. All states have at least one court of general jurisdiction, which would be similar to an Oregon Circuit Court.

The draft does not deal with one problem discussed at the meeting and that is the reliability of an oath administered over the telephone. It could be argued that the person administering the oath should be in the physical presence of the witness to make the witness recognize the importance of the testimony and truthfulness. It could also be argued that, if the person administering the oath cannot observe the demeanor of the witness and secure identification, there is no guarantee that the person testifying is actually the person sought to be deposed. The Council members were, however, adamant that they wanted a procedure that would allow a local court reporter to administer the oath by telephone. As a practical matter, the ceremonial effect of the presence of the person administering the oath is probably overstated. As for identity of the witness, the person taking the deposition, or anyone who might wish to use it for any purpose, would have the burden of suggesting identification procedures that would assure proper identification of the deponent.

3. **Exclusion of witnesses at depositions**

After discussion with Janice Stewart, we suggest the following as a redraft of ORCP 39 D. This draft attempts to control presence of witnesses at depositions in light of the concerns expressed by the Council at the last meeting:

> ORCP 39 D. **Examination and cross-examination; record of examination; oath; objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Oregon Evidence Code. Unless the court orders otherwise, only the following persons may be present during the deposition: (1) attorneys representing the parties, (2) any party who is a natural person, and (3) an officer or employee of a party which is not a natural person designated as its representative by its attorney.

The existing rule says that examination and cross-examination may proceed as at trial. This draft refers to the Oregon Evidence Code. The Oregon Evidence Code is defined in ORS 40.010.

The draft defines who ordinarily may be present at deposition and requires a court order to change the usual rule. ORE 615 allows the court to direct that witnesses be excluded from trial, except for certain categories of witnesses. The deposition categories of normal attenders are generally the categories that cannot be excluded from trial under ORE 615. It is the opposite of ORE 615 because a court order is necessary to change the limitation not to create it.

The categories used differ slightly between this draft and ORE 615. ORE 615 does not specifically mention attorneys. This draft would allow any attorney representing a party to be present, not just an attorney of record for a party. There is no limit upon the number of attorneys that may attend for one party. The rule would, however, allow only one corporate representative without court order. This is consistent with ORE 615.

ORE 615 says that the court cannot exclude persons whose presence is essential to the presentation of a party's cause. This category is not used for depositions because it is too vague to be applied without court discretion. It would provide one basis for arguing that the court should allow an additional person to attend the deposition.

Other than a court order, if a party wants to have additional persons in attendance, the stipulation of all parties to the case would be necessary.

4. **Limiting secrecy in personal injury actions.**

In addition to the material which you have already received on secrecy in personal injury actions, Maury Holland has called our attention to an article in the 1991 Harvard Law Review by Professor Arthur Miller, "Confidentiality, Protective Orders and Public Access to the Courts", 105 Harvard Law Review 427. The article is an excellent and thoughtful review of the area.

His summary of current legislation and rules is somewhat different than that submitted by OTLA. He identified over 30 states where proposals for general and substantial legislative or rule changes have been introduced, but only three where these proposals have been adopted (Virginia, Florida, and Texas; copies of these statutes or rules were furnished to us by OTLA). In Oregon and North Carolina, the changes are limited to cases involving public agencies. The New York rule only codifies existing practice by requiring a showing of due cause before public records can be sealed. He also identifies four of the states listed as pending by OTLA as states rejecting change. In Alaska and Maine, the proposals died in committee and in California and Hawaii, the proposals have been withdrawn by their sponsors.

Miller ends up opposing any elaborate procedural changes or presumption of public access. The entire article is too long to distribute, but his suggestions for modification of existing practice in the area are attached.

6. **Administrative subpoenas and hospital records.**

I recommend that the following changes be made in ORCP 55. The new language would make the subpoena for production of

records without a command to appear at trial or deposition inapplicable to hospital records as defined in ORCP 55 H(1). It would make the procedure described in ORCP 55 H the only procedure applicable to hospital records. This would solve the problems pointed out by Karen Creason and be consistent with the intent of the Council during the last biennium.

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**, except as provided in paragraph H(4)(a) of this rule,** 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.

* * *

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

H.(4)(a) **Hospital records may not be subject to a subpoena commanding production of such records without a command to appear for deposition, hearing, or trial.**

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

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

H.(4)[(b)]**(c)** If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a)

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

* * *

7. **Costs - copying of public records**

The following language is intended to limit application of the public records provision in ORCP 68 A(2) to situations where use of certified copies of public records was mandatory. The word "necessary" in the existing rule is redundant.

> ORCP 68 A(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book or document [used as evidence on trial] admitted into evidence at trial pursuant to ORS 40.570 (Oregon Evidence Code, Rule 1005); ...

8. **ORS sections limiting ORCP 7 E.**

As requested, I did a computer search to see how many ORS sections changed the limits on who may serve summons found in ORCP 7 E. The only ORS section that modifies ORCP 7 E is ORS 180.260 (attached) which allows employees of the Department of Justice to serve summons and process in cases in which the state is interested. The statute was enacted by the 1989 Legislature. We could amend ORCP 7 E as follows:

> ORCP 7 E. **By whom served; compensation.** A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, **except as provided in ORS 180.260,** an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. ...

Attachments

adversary system and hardly is unique to protective orders.[312] The criminal attorney who seeks a not-guilty verdict for a client he knows to be guilty faces the same concerns. Yet that attorney is expected to defend the client without fear of being treated as an accomplice after the fact. The judgment has been made that society is benefitted if clients may rely on their lawyers not to disclose their confidences[313] and are assured that their lawyers' personal judgments regarding the desirability of public disclosure will not prejudice their cases.[314] The rules of professional responsibility on this issue are clear — the attorney's duty is to pursue the client's best interests zealously.[315] If doing so creates a personal conflict of interest, the attorney should refuse to take the case[316] or should secure the client's informed consent to the disclosure of any matter affecting public health or safety before the question of a protective order arises.[317]

VII. Balancing the Competing Interests of Confidentiality and Public Access: A Proposal for the Refinement of Current Practice

No one doubts that a rational civil justice system should have a concern for public health and safety. It is also clear that, because there are benefits from discovery sharing, it should be allowed when sharing truly promotes fairness and efficiency. However, the civil justice system also must promote effective judicial management, efficiency in the resolution of disputes, and the preservation of confidentiality. Further, the system must not lose sight of the primary objectives of discovery: "Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."[318] Thus, the national concern for public health and safety or the openness of our courts must be addressed in a way that does not substantially hinder the achievement of these other goals.

These varied and sometimes divergent policies can be served by our civil justice process, but only by trusting trial courts to exercise their traditional discretion guided by a careful analysis of the various competing interests. No one is advocating the automatic or cavalier issuance of protective or sealing orders, let alone that they be granted without regard for substantially deleterious effects on public health and safety. But although disclosure of health and safety information is important, disclosure must be controlled, not indiscriminate. First, a neutral arbiter — the judge and not the litigants — must decide what information is to be revealed in the interest of public health and safety. Second, because a trial court has neither the time nor the expertise to examine carefully every claim of confidentiality that impairs legitimate and important public interests,[319] the process would be facilitated if, after a preliminary judicial determination that information should not be kept wholly confidential, disclosure were usually made to the appropriate governmental agency for further evaluation rather than to the public at large.

The most rational approach, therefore, is to try to accommodate the concerns raised by critics of protective orders without sacrificing the utility of protective orders themselves. Public health and safety can be promoted without resort to uncontrolled and potentially damaging public dissemination of information by the litigants. The benefits and harms of providing confidentiality or permitting disclosure can be balanced to achieve the most appropriate resolution of a particular conflict. The key, however, is retaining judicial discretion. If that discretion is constricted arbitrarily, the trial court's ability to meet the divergent goals of the pretrial process will be diminished.

Because proponents of reform have not demonstrated that significant modification of the present framework is necessary, the existing pragmatic and discretionary balancing technique should be retained. It may be true that substituting a rule that creates a presumption of access for all information, or for enumerated predetermined classes of information, would result in somewhat more predictable outcomes. Unfortunately, the results would correlate only haphazardly to notions of fairness, which are inevitably a function of the particulars of a given case. Too many relevant factors demand consideration to reduce the question of whether to grant a protective order to a simple rule or one with arbitrary criteria for disclosure or nondisclosure.

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[312] *See* Model Code of Professional Responsibility Canon 4 (1986) ("A Lawyer Should Preserve the Confidences and Secrets of a Client."); Model Rules of Professional Conduct Rule 1.6 cmt. [4] (1983) ("A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.").

[313] *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 617 (arguing that to find in lawyers "a moral obligation to refuse to facilitate that which the lawyer believes to be immoral, is to substitute lawyers' beliefs for individual autonomy and diversity. Such a screening submits each to the prior restraint of the judge/facilitator and to rule by an oligarchy of lawyers.").

[314] *See* Model Rules of Professional Conduct Rule 3.6 (1983) (advising that a lawyer should not make extrajudicial statements that may be disseminated to the public if it will materially prejudice the adjudicative process).

[315] *See* Model Code of Professional Responsibility Canon 7 (1986).

[316] *See* Model Rules of Professional Conduct Rule 1.7 (1983) (instructing that a lawyer should not represent a client if representation will be limited by the lawyer's own or another client's interests).

[317] Because, in reality, disclosure will often weaken the plaintiff's bargaining position for securing the defendant's acquiescence in discovery of certain materials and also damage the plaintiff's ability to maximize the settlement value, the client's informed consent is critical.

[318] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984).

[319] *See* Marcus, *supra* note 9, at 472.

Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases.[320] By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of protective and sealing orders and the unnecessary denial of confidentiality for information that deserves it, whether or not the information falls within one of the classes for which confidentiality is traditionally sought.[321]

The existing procedural framework, however, must be applied with a heightened sense of the importance of the issues raised by both sides of the current debate. Judges must guard against any notion that the issuance of protective orders is routine, let alone automatic, even when the application is supported by all the parties.[322] Thus, they must look carefully at each case and tailor appropriate responses, which should take account of a kaleidoscope of factors, including the likely outcome on the merits, the value or importance of commercial or personal data, the identity of the parties and any apparent outside interests, the existence of any threat to health and safety, and the

[320] A court has broad discretion under Federal Rule 26(c), for example, to shape a protective order to the needs of a specific case. *See* Tahoe Ins. Co. v. Morrison-Knudsen Co., 84 F.R.D. 362, 364 (D. Idaho 1979); 8 WRIGHT & MILLER, *supra* note 14, § 2036, at 269; *see also* Lewis R. Pyle Memorial Hosp. v. Superior Court, 717 P.2d 872, 876 (Ariz. 1986) ("The good cause standard gives courts very broad discretion to tailor protective provisions to fit the needs of the case.").

[321] For example, the Texas rule requires public notice of every request to seal court records. *See* TEX. R. CIV. P. ANN. r. 76a(3) (West Supp. 1991). Requests have been made to seal a wide variety of information. In a wrongful death case, the defendant sought confidentiality for an employee handbook that contained a pizza recipe. *See* DePriest v. Pizza Management Inc., No. 483, 464 (Travis County Dist. Ct., 53rd Jud. Dist., Tx. Sept. 17, 1990). In a malpractice action, the plaintiff sought confidentiality for personal bank account statements, personal income tax returns, real estate deeds, certificates of stock ownership, and certificates of title to motor vehicles. *See* McGowen v. Jones, No. 141-126533-90 (Tarrant County Dist. Ct., 141st Jud. Dist., Tx. Sept. 21, 1990). In a personal injury action, defendant sought confidentiality for design and sales information about a popular athletic shoe. *See* White v. Reebok Int'l, Ltd., No. 88-45391 (Harris County Dist. Ct., 125th Jud. Dist., Tx. Nov. 26, 1990). In another case involving a counterclaim for breach of contract and deceptive trade practices, the counter-plaintiff sought a court seal for records concerning the price and intended use of property involved in the contract dispute. *See* Lindsay v. Jacobs, No. 90-06657 (Harris County Dist. Ct., 165th Jud. Dist., Tx. Oct. 24, 1990).

[322] When all the parties support the protective order or seal, as often is the case when the defendant seeks confidentiality and the plaintiff wants to facilitate its own access to discovery materials, the court is faced with an essentially non-adversarial situation and must assume the duty of making an independent inquiry. A useful analogue is the "fiduciary" burden assumed by federal judges in evaluating a proposed class action settlement under Federal Rule 23(e). *See generally* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1797.1, at 378–416 (2d ed. 1986) (detailing the issues a judge should consider). This seems to have been the approach taken in City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995 (2d Cir. Aug. 14, 1991), which spoke of the court's "larger role" in this context. *See id.* at *15–16.

presence of a governmental agency with primary responsibility for the subject matter of the data. The burden imposed by carefully considering requests for protective orders is justified by the importance of the competing values at stake and is an effective way to conserve judicial resources. Because the current practice has become increasingly well-adapted to controlling discovery abuses, it can be expected to be more efficient in balancing the various interests than other alternatives.

By contrast, a regime that has a public access presumption and removes judicial discretion in shaping protective orders invites exploitation of the discovery process by those primarily seeking to gather information rather than to adjudicate a dispute. Moreover, the proposed public access regime holds out pernicious incentives not only to the parties to the litigation, but also to any curious member of the general public. In addition, retaining judicial discretion only requires judges to undertake a task that is familiar and appropriate to them — balancing the rights of the private parties before them. Shifting to a presumption of public access would require judges to assume the extrajudicial task of factoring in the interests of third parties and the public, which in turn would necessitate that judges become experts in the countless subjects that come before them — a task for which they are not necessarily equipped — and that they reach a decision outside the confines of a fully adversarial dispute.[323]

Trial courts generally should require the parties to the case or third parties to submit specific, written showings of why access should be granted, and they should feel free to review the documents in camera.[324] Based on their careful review, courts should deny disclosure of information worthy of protection unless the party seeking it establishes relevance, demonstrates a true need for the information, and shows that this need outweighs the potential harm to the party opposing discovery.[325]

When the information is subject to discovery, the question then becomes whether terms and conditions should be imposed to minimize the damage public availability of the information might cause. In

[323] *See supra* pp. 487–88.

[324] *See generally* G. I. Fodier, Annotation, *In Camera Trial or Hearing and Other Procedures to Safeguard Trade Secrets or the Like Against Undue Disclosure in Course of Civil Action Involving Such Secret*, 62 A.L.R.2d 509, 516–33 (1958) (discussing a procedure that could be used to protect trade secrets from public or other disclosure). Even the disclosures that occur in the process of adjudicating the protective-order question pose risks that must be guarded against. *See generally* Michael A. Pope, William R. Quinlan & Thomas L. Duston, *Protecting a Client's Secret Data*, NAT'L L.J., July 8, 1991, at 15 (emphasizing the importance of developing sophisticated judicial approaches to discovery that can protect confidential business secrets).

[325] It would be more difficult for third parties to satisfy the first two requirements than it would be for parties to the action. This outcome is both sensible and consonant with current law.

considering terms and conditions, courts should pay attention to the possible existence of any specific nonparty interests or the importance of public disclosure. It would be a mistake, however, to establish an elaborate public notice and intervention procedure — let alone provide for appellate review — each time a protective order is sought.[326] These procedures would delay and distract the litigation, increase the costs to the litigants, dissipate judicial energies, and in themselves would lead to a disclosure of some or all of the information. Instead, the court usually can rely on one of the parties to represent any outside interest or to notify those persons or institutions of the proceeding so that they may seek to intervene. Moreover, the media generally have their own methods for staying abreast of potentially newsworthy cases.[327] When these safeguards might not be effective, the court can use its discretion to require the parties to present any public health and safety concerns to the court or appoint a third person to do so.

When a party requesting protection has made a meritorious showing regarding the need for confidentiality but the judge nonetheless decides that the public interest in some of the information precludes completely sealing the records, the court should limit the information made available to that which is critical to the perceived public interest. Clearly, any confidential information unrelated to the potential harm, such as sensitive marketing or financial data, trade secrets, personal information, and a variety of other items, could and should be protected, even when it is appropriate to make some other portion of the information available to the public.

Even after the information is redacted and limited to that thought relevant to the public interest, the court must consider the proper mode of its disclosure. In most cases, release to an appropriate governmental agency or a limited number of people should suffice.[328] This solution places the information in the hands of those best situated to evaluate it and spares the judge from undertaking a detailed and time-consuming analysis to balance the likelihood of risk to the public against the harm to the disclosing party — an evaluation a judge is often ill-equipped to conduct.[329] If appropriate, further dissemination

[326] One of the least desirable aspects of some of the public access proposals is that they are heavily weighted with procedural requirements such as public notice, waiting periods, intervention proceedings, and rights to appeal. *See, e.g.*, TEX. R. CIV. P. ANN. r. 76a (West Supp. 1991).

[327] *See, e.g.*, City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995, at *4–5 (2d Cir. Aug. 14, 1991).

[328] *See, e.g.*, Anderson v. Cryovac, Inc., 805 F.2d 1, 8 (1st Cir. 1986) ("In a case involving allegations that a city's water supply had been poisoned by toxic chemicals, the public interest required that information bearing on this problem be made available to those charged with protecting the public's health.").

[329] *See supra* pp. 488–90.

by the litigants and the outside recipients of the data must be prohibited.

This technique for limiting access has been used in other contexts, as when the government has a legitimate reason to intrude into the private affairs of its citizens, but the intrusion is limited to the particular persons and the purposes necessary to achieve the government's original objective.[330] Partial disclosure is also common practice in civil litigation when documents contain a mixture of information that falls both within and outside the work product doctrine.[331] Nevertheless, there may be instances when public dissemination is appropriate and no protective order should issue, although these occasions should be rare when the data is truly confidential.[332]

In addition, if confidential information is to be disclosed under a protective order, a court must define the terms of that release with precision.[333] The trial court should consider exactly who should have access to the data other than the discovering party's attorney, and for what purpose. The court must decide whether expert witnesses, support personnel, and other litigants and their attorneys are to have access.[334] Once again, the circumstances of the particular case should control. For example, when the litigation is between business com-

[330] *Cf.* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 4.5(b), at 236–37 (1985) (stating that the government must minimize the scope of intrusion during authorized electronic surveillance). Some information privacy statutes limit access to personal information on a need-to-know basis. *See, e.g.*, Federal Fair Information Practices Act, 5 U.S.C. § 552a (1988); Federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1988).

[331] *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 400 (1981).

[332] *Cf.* Note, *supra* note 205, at 1348–49 (proposing that, although failure to provide a protective order for trade secrets generally would work a taking under the Fifth Amendment, a narrow "nuisance" exception should apply to "allow public disclosure . . . only if limiting access would significantly endanger the public").

[333] Courts have great flexibility to shape protective orders in order to meet the needs of a particular case. *See* 8 WRIGHT & MILLER, *supra* note 14, § 2043, at 305–08. A good example of this flexibility is Maritime Cinema Serv. Corp. v. Movies en Route, Inc., 60 F.R.D. 587 (S.D.N.Y. 1973), which allowed the plaintiff to compel the defendant to answer certain interrogatories only on condition that the answers be seen by plaintiff's counsel but not by the plaintiff itself. *See id.* at 589–90.

[334] A number of courts have limited disclosure to parties' counsel and sometimes their expert witnesses. *See, e.g.*, Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); General Elec. Co. v. Allinger, No. 91-316-FR, 1991 U.S. Dist. LEXIS 10878, at *4 (D. Or. Aug. 1, 1991); Ohm Resource Recovery Corp. v. Industrial Fuels & Resources, Inc., No. S90-511, 1991 U.S. Dist. LEXIS 10297, at *14 (N.D. Ind. July 24, 1991); Coca-Cola Bottling Co. v. Coca-Cola Co., 107 F.R.D. 288, 300 (D. Del. 1985). Courts have also prevented a governmental agency from using discovery material for purposes outside the litigation, *see* Harris v. Amoco Prod. Co., 768 F.2d 669, 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), and have prevented a state from divulging information to the public and to government employees other than designated workers who signed confidentiality affidavits, *see* New York v. United States Metal Ref. Co., 771 F.2d 796, 805 (3d Cir. 1985).

petitors, the court must take seriously the claim that disclosing research and development information to the opposing party can have serious negative marketplace consequences. It is unrealistic to believe that even well-intentioned scientists and managers can purge their minds of an opponent's commercially valuable information once it is disclosed through discovery. In some cases, it may be necessary to limit distribution to the discovering party's attorneys — perhaps even restricting it to outside counsel — under carefully drawn conditions. In other cases, the discovery objectives can be achieved by using a neutral third party or master to screen the material. In another group of cases, disclosure to the opposing party will not have any special adverse consequences, and these types of precautions will be unnecessary.

As already indicated,[335] disclosure to experts poses special difficulties and risks. If experts are to be granted access, the terms and conditions should be defined with care, and the recipients should be brought under the court's control by having them sign a pledge to adhere to the order's limitations. The court also must consider whether photocopying or computerization is to be permitted and when and on what terms the original material and any copies are to be returned to the owner.[336] Anyone receiving the protected data should be made responsible for maintaining its confidentiality and for impressing that obligation on their employees. The court should be especially careful when materials belonging to nonparties are involved.

In addition to minimizing the risks to the disclosing party, courts must allocate their resources wisely. To avoid increasing the court's workload unnecessarily, a determination regarding the public's interest in discovery materials or settlement terms and any supervision of the release may be obviated if the information can be procured from an alternative source in substantially equivalent form. This requirement is analogous to the practice under Federal Rule 26(b)(3) and under similar rules in most states regarding the discoverability of work product.[337] If the information is otherwise available, grappling with the protective order issue and imposing a supervisory burden on the courts is not justified.[338]

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335 *See supra* p. 471.

336 *See, e.g.*, *Allinger*, 1991 U.S. Dist. LEXIS 10878, at *4.

337 *See* Upjohn v. United States, 449 U.S. 383, 400 (1981).

338 *See* City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995, at *16 (2d Cir. Aug. 14, 1991) (concluding that a confidentiality order should only be issued after a careful, particularized review); *cf.* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 761 (1989) (arguing that, if federal agencies were required to disseminate information to the public about private individuals merely because the information was contained in public records, the government would be "transformed in one fell swoop into *the* clearinghouse for highly personal information, releasing records on any person, to any requestor, for any purpose").

Discovery sharing is a particularly interesting problem. It can take either of two forms: the discovering party seeks to share the fruits of its efforts with an outsider engaged in similar or related litigation, or an outsider tries to gain access to the fruits of discovery independent of the litigants' desires. Courts have not been consistent in their treatment of these situations;[339] the nature of the problem probably makes that inconsistency inevitable.

It is difficult, and indeed unwise, to have an absolute prohibition on discovery sharing, given the extraordinarily high cost of litigation and the reality that discovery accounts for the largest component of that expense in many cases. Barring sharing smacks too much of requiring each litigant to reinvent the wheel, and not surprisingly it has been rejected on that basis by some courts.[340] As Judge Wisdom has put it, there "is no reason to erect gratuitous roadblocks in the path of a litigant who finds a trail blazed by another."[341] But always permitting sharing would be a mistake as well. Once again, leaving the decision to permit or deny sharing in the judge's discretion seems the best course to follow.

Certainly, discovery sharing should not be left to the whims or private interests of individual parties. In analyzing a discovery sharing request, the court's central inquiry should be whether granting the request will actually promote litigation efficiency and fairness. Thus, the court should be particularly hesitant when the sharing seems motivated by a desire to commercialize the data by selling it to other

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339 The cases allowing sharing include Wilk v. AMA, 635 F.2d 1295 (7th Cir. 1980); Wauchop v. Domino's Pizza, Inc., No. S90-496(RLM), 1991 U.S. Dist. LEXIS 11694 (N.D. Ind. Aug. 6, 1991); Nestle Foods Corp. v. Aetna Casualty & Sur. Co., No. 89-1701(CSF), 1990 U.S. Dist. LEXIS 12137 (D.N.J. Jan. 25, 1990); United States v. Kentucky Utils. Co., 124 F.R.D. 146 (E.D. Ky. 1989); and Deford v. Schmid Prods. Co., 120 F.R.D. 648 (D. Md. 1987). Cases denying sharing include Scott v. Monsanto Co., 868 F.2d 786 (5th Cir. 1989); Palmieri v. New York, 779 F.2d 861 (2d Cir. 1985); and Mampe v. Ayerst Labs., 548 A.2d 798 (D.C. 1988). *See generally* Gary L. Wilson, Note, Seattle Times: *What Effect on Discovery Sharing?*, 1985 WIS. L. REV. 1055 (arguing that the use of *Seattle Times* as a legal support against discovery sharing is improper); Thomas M. Fleming, Annotation, *Propriety and Extent of State Court Protective Order Restricting Party's Right to Disclose Discovered Information to Others Engaged in Similar Litigation*, 83 A.L.R. 4TH 987 (1991) (analyzing cases that have considered protective orders for the disclosure of discovered material to similarly situated litigants and observing that state courts generally disapprove of categorical prohibitions on disclosure but are willing to impose restrictions to protect trade secrets). The new Virginia statute expressly authorizes the sharing of discovery materials that are under a protective order. *See* VA. CODE ANN. § 8.01-420.01 (Michie Supp. 1991).

340 *See, e.g.*, Wauchop v. Domino's Pizza, Inc., No. S90-496(RLM), 1991 U.S. Dist. LEXIS 11694, at *13 (N.D. Ind. Aug. 6, 1991); Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982); Patterson v. Ford Motor Co., 85 F.R.D. 152, 153-54 (W.D. Tex. 1980); *see also* Baker v. Liggett Group, Inc., 132 F.R.D. 123, 126 (D. Mass. 1990) (issuing a protective order authorizing disclosure of confidential materials to other tobacco tort litigants, under appropriate restraints).

341 Wilk v. AMA, 635 F.2d 1295, 1301 (7th Cir. 1980).

attorneys rather than by a desire to promote litigation efficiency[342] or when the action itself was brought to gain access to discovery.[343] The judge should consider whether the benefits of making the material available in other lawsuits and the economies achieved when lawyers collaborate in preparing their cases outweigh the likelihood of increasing discovery disputes in the original lawsuit and the other deleterious consequences of dissemination. For example, when a single event has given rise to complex or multidistrict litigation, the adjudicatory system will often be well-served by allowing the pooling of discovery materials in all the suits, particularly when some have been consolidated for pretrial or all purposes.[344] The same occurs naturally when disputes are aggregated into a class action.

The problem is somewhat more difficult when the cases in which the protected data would be used are not fused with the one in which

[342] In Campbell, *supra* note 11, the author suggests that there are financial rewards in vending discovery materials. *See id.* at 774; *see also* Brad N. Friedman, Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order*, 60 N.Y.U. L. REV. 1137, 1155–58 (1985) (discussing the ethical implications of compensation raised by information markets in discovered material). Although the commercialization of discovery material cannot be condoned, particularly when it contains proprietary data, it may be appropriate to allow a plaintiff to recoup the costs incurred in developing the information. *See* Marcus, *supra* note 9, at 498–99; *cf.* Edward F. Sherman & Stephen O. Kinnard, *Federal Court Discovery in the 80's — Making the Rules Work*, 95 F.R.D. 245, 289 (1982) (proposing the imposition of a duty on the plaintiff to make discovery available to others without "undue" profit). Unfortunately, only the court is in a position to make a neutral judgment as to what is reasonable, and requiring courts to make those judgments would divert scarce judicial resources.

[343] *See generally Wilk*, 635 F.2d at 1300–01 (implying that a party bringing suit solely to obtain discovery material would not be entitled to a "day in court"); *Wauchop*, 1991 U.S. Dist. LEXIS 11694, at *15 (recognizing that a different result would be appropriate "if litigation was commenced solely for purposes of engaging in discovery"); *Patterson*, 85 F.R.D. at 154 (allowing the full use of information in other forums absent a showing that the "discovering party is exploiting the instant litigation solely to assist litigation in a foreign forum").

[344] *See, e.g.*, *In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 81 F.R.D. 482, 484 (E.D. Mich. 1979) (vacating a protective order and thereby allowing state court plaintiffs to share discovery information with consolidated federal multidistrict litigation plaintiffs), *aff'd*, 664 F.2d 114 (6th Cir. 1981).

Numerous proposals in recent years suggest that a substantial increase in the aggregation of related lawsuits is likely in the future. *See, e.g.*, 136 CONG. REC. H3116–19 (daily ed. June 5, 1990) (voting to pass the Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess.); AMERICAN BAR ASS'N, REPORT OF THE COMMISSION ON MASS TORTS (1989); JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 91, at 44–45 (proposing an amendment to a multidistrict litigation statute to permit consolidated trials as well as pretrial proceedings); American Law Inst., Complex Litigation Project (Tentative Draft No. 4) §§ 4.01–.02, at 25–92 (Sept. 19, 1991) (providing for the transfer of related cases from federal to state court as well as from state to state); American Law Inst., Complex Litigation Project (Tentative Draft No. 2) §§ 3.01–.10, at 1–26 (Apr. 6, 1990) (proposing federal intrasystem consolidation and transfer, including trial); *id.* §§ 5.01–.05, at 33–129 (discussing a proposed complex litigation statute for federal-state intersystem consolidation); National Conference of Comm'rs of Uniform State Laws, Transfer of Litigation Act (July 1991).

it is originally produced and the relationship is somewhat attenuated or when the cases are dispersed in multiple judicial systems. Still, a collaborative approach in handling related litigation of this type may be best. The court must scrutinize these situations with extreme care, and it should communicate with the judges in the other pending actions when that seems desirable. Of course, if confidential information is to be shared among litigants, they all should be subject to the court's restrictions on further dissemination or any other limitations it might initially have ordered.[345] Again, the participation of the judges handling the related cases would be desirable.

The least sympathetic case for discovery sharing is presented by a request for access on behalf of someone who is merely contemplating the commencement of litigation. The risk of a fishing expedition or some other form of mischief is greatest in this context. The safest course seems to be denial of discovery sharing until the requesting party actually has begun a lawsuit, unless he demonstrates extraordinary need. This requirement will maximize the likelihood that the sharing has a legitimate litigation purpose, that the actions have a relationship to each other so that some discovery economy actually will be achieved, and that the requester is subject to the authority of a court, which might prove valuable for sanctions purposes.

An important and related problem arises when parties seek access to material that was previously disclosed under a protective order.[346] Because that order presumably was issued to prevent harm to the litigants and to promote cooperation during discovery, the court should consider the overall effect of modifying or eliminating that protection.[347] The critical question is to what degree not giving continued effect to earlier protective orders will diminish their efficacy as a discovery management device. To the extent that the parties relied on the protective order when they freely disclosed information without

[345] *See, e.g.*, United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1428 (10th Cir. 1990) (allowing discovery sharing but imposing on the third party "the restrictions on use and disclosure contained in the original protective order"), *cert. denied*, 111 S. Ct. 799 (1991).

[346] Requests for modification of protective orders are relatively common and are subject to varying treatment by courts. *See, e.g.*, Westchester Radiological Ass'n P.C. v. Blue Cross/Blue Shield of Greater New York, Inc., No. 85-CV-2733(KMW), 1991 U.S. Dist. LEXIS 9216 (S.D.N.Y. July 3, 1991); *see also* HARE, GILBERT & REMINE, *supra* note 11, § 6.11, at 144 (discussing cases on order modification); 8 WRIGHT & MILLER, *supra* note 14, § 2042, at 299 n.13 (1970 & Supp. 1991) (same); Robin C. Larner, Annotation, *Modification of Protective Order Entered Pursuant to Rule 26(c), Federal Rules of Civil Procedure*, 85 A.L.R. FED. 538 (1987 & Supp. 1990) (same).

[347] *See* Béchamps, *supra* note 255, at 130 (1990); *see also* Grundberg v. Upjohn Co., No. C-89-2746, 1991 U.S. Dist. LEXIS 14991 (D. Utah Oct. 4, 1991) (considering all relevant factors to determine whether changed circumstances warranted the modification of a protective order); All-Tone Communications, Inc. v. American Info. Technologies, No. 87-C-2186, 1991 U.S. Dist. LEXIS 10096, at *6 (N.D. Ill. July 18, 1991) (adopting the view that a court should consider the circumstances leading up to production prior to releasing judicial records).

further contesting the discovery requests,[348] subsequent dissemination would be unfair.[349] A graphic illustration of this injustice would be a party or witness who chooses to forego a plausible claim of privilege under the assurance that a protective order will shield the communication from subsequent disclosure.[350] Conversely, compulsory disclosure of information to a governmental or public entity under circumstances that make it accessible to the public, a significant passage of time, or a change in other circumstances may undermine the credibility of any claim of reliance. Indeed, some of these events might vitiate the data's sensitivity to the point of assuring that its release will not cause any injury to the original parties. If the information implicates personal privacy, however, in certain circumstances the passage of time may strengthen the privacy interest and militate against modification of the protective order.[351]

Quite understandably, a court's reaction to a modification request should depend in part on the nature of the information and the type of modification that is sought. The protection of sensitive personal or commercial information should be continued. But if the material could improve the efficiency of handling other lawsuits without jeopardizing the rights of the parties to the protective order, modification may be appropriate.

Beyond unfairness to particular parties is the reality that, the more readily protective orders are destabilized, the less confidence litigants will have in them. If protective orders are not reliable, people will be more likely to contest discovery requests when private or commercially valuable data is involved. A protective order can be effective as a management tool and as a mechanism for preventing discovery abuse only if parties believe it is credible. If the parties know that the protective order can be abrogated easily, cooperation in discovery would be compromised and one significant incentive to settle would

[348] *See, e.g.*, H.L. Hayden Co. v. Siemens Medical Sys., 130 F.R.D. 281, 282 (S.D.N.Y. 1989); Tavoulareas v. Washington Post Co., 111 F.R.D. 653, 658–59 (D.D.C. 1986); *In re* Consumers Power Co. Sec. Litig., 109 F.R.D. 45, 55 (E.D. Mich. 1985).

[349] *See, e.g.*, Martindell v. ITT Corp., 594 F.2d 291, 295–96 (2d Cir. 1979); *see also Westchester*, 1991 U.S. Dist. LEXIS 9216, at *17 (modifying a confidentiality order to permit the disclosure of documents and testimony given before an order was in place). One court has suggested that "some element of a breach of faith" is involved. *In re* Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, 18 Fed. R. Serv. 2d (Callaghan) 1251, 1252 (N.D. Cal. 1974).

[350] The unfair consequences are not limited to the parties. Indeed, a nonparty witness who testifies under the aegis of a protective order only to have his guarantee of confidentiality eliminated by a modification of the order quite properly can feel aggrieved.

[351] For example, in United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), the Court refused to require that the press be given access to ten-year-old criminal records; it found that any public interest in the criminal activity had been vitiated by the passage of time and that the subject of the record now had a protectable privacy interest that did not exist at the time the criminal act originally took place. *See id.* at 762–71.

be reduced. Thus, unless strong evidence exists that a litigant did not rely on the existence of a protective order during discovery (for example, when the party continued to resist reasonable discovery requests) or that no legitimate interest exists in maintaining confidentiality, the balancing of the competing values that led the initial trial court to issue the order should not be undermined in a later proceeding.[352] The reality seems obvious: for protective orders to be effective, litigants must be able to rely on them.[353]

VIII. CONCLUSION

When all of the elements in the confidentiality and public access debate are placed on the scales, the balance clearly favors retaining the essence of the present practice. Courts should continue to use their discretion to protect parties' legitimate litigation, privacy, and property interests, and the parties should retain their rights to negotiate protective and sealing agreements voluntarily, subject to judicial veto in the exceptional case. This practice seems wise, because it leaves our judges free to consider the public interest and to further it when circumstances so require. Moreover, on the whole, judges appear to have exercised this authority appropriately in the past, and there is no reason to believe that their performance will change, especially if they are encouraged to continue their current practices. Because the court is the only neutral participant in the litigation process, it seems appropriate to leave the decisionmaking process with it.

Further, no evidence has been presented that the current practice has created significant risks to public health or safety. At a minimum, therefore, before we rush sheeplike down the path chosen by Texas, Florida, and Virginia and create anything in the nature of a presumption of public access, we must evaluate carefully the public health and safety claims to determine whether a problem exists. Certainly, no evidence has emerged to date that comes close to justifying the fundamental changes in the process sought by those advocating them, especially when the negative effects of these changes would be

[352] *See* Palmieri v. New York, 779 F.2d 861, 862 (2d Cir. 1985) ("[A]bsent an express finding by the district court of improvidence in the magistrate's initial grant of the protective orders or of extraordinary circumstances or compelling need by the State for the information protected thereunder, it was error for the district court to modify the magistrate's orders."); New York v. United States Metals Ref. Co., 771 F.2d 796, 805 (3d Cir. 1985) (concluding that the district court did not abuse its discretion by including a report under a protective order on the basis of irreparable harm to defendant and the absence of public welfare concerns).

[353] *See generally* Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 18 (1983) (questioning whether litigants can still rely on protective orders).

felt in the vast majority of civil cases, which have nothing to do with public health or safety.

Despite protestations to the contrary, the existing system gives the public, including the media, virtually unfettered access to the courts and court records. The presumption advocated by the current public access campaign undermines the greater judicial control necessary for discovery and pretrial reform, and it comes at a time when the need for treating certain types of litigation information confidentially never has been greater. It would be folly to allow undocumented claims to move our complex and integrated procedural systems in the wrong direction.

The current debate has been quite useful, however. It has called the attention of the bench and bar to the importance of the underlying issues[354] and has increased everyone's awareness of the importance of both confidentiality and public access. The controversy should counteract any existing tendencies by judges to issue protective and sealing orders perfunctorily or cavalierly. If that awareness is coupled with a judicial willingness to follow the procedural requirements proposed earlier for resolving clashes between confidentiality and disclosure, the debate will have served a valuable purpose.

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[354] *See, e.g.*, John F. Rooney, *Issue of Sealed Files, Secrecy in the Courts Won't Be Swept Under the Rug*, CHI. DAILY L. BULL., Apr. 20, 1991, at 1 (chronicling the increase in judicial sensitivity toward sealing orders).

SHOULD THE LAW PROHIBIT "MANIPULATION" IN FINANCIAL MARKETS?

*Daniel R. Fischel** *and David J. Ross***

I. INTRODUCTION

Much of the regulation of financial markets seeks to prevent manipulation. The drafters of the Securities Act of 1933[1] and the Securities Exchange Act of 1934,[2] for example, were convinced that there was a direct link between excessive speculation, the stock market crash of 1929, and the Great Depression of the 1930s. Thus, section 2 of the Securities Exchange Act states:

> National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets . . . .[3]

Of particular concern to the drafters, as they repeatedly emphasized in the legislative history, were the well-publicized "pools" dating from the mid-nineteenth century in which perceived combinations of issuers, underwriters, and speculators, by their trading activities, allegedly caused wild fluctuations in security prices.[4]

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[1] Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a–77aa (1988)).

[2] Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a–78ll (1988)).

[3] 15 U.S.C. § 78b(4) (1988).

[4] The legislative history of the securities laws, including the concern about the "pools," is exhaustively analyzed in Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 424–61 (1990) [hereinafter Thel, *Original Conception*]; and Steve Thel, *Regulation of Manipulation Under Section 10(b): Security Prices and the Text of the Securities Exchange Act of 1934*, 1988 COLUM. BUS. L. REV. 359, 362–82 [hereinafter Thel, *Manipulation Under Section 10(b)*]. *See also* TWENTIETH CENTURY FUND, INC., THE SECURITY MARKETS 445 (Alfred L. Bernheim & Margaret G. Schneider eds., 1935) ("[T]he more important [manipulative] market campaigns . . . are the work of groups organized into syndicates, pools or joint accounts."); Norman S. Poser, *Stock Market Manipulation and Corporate Control Transactions*, 40 MIAMI L. REV. 671, 691 (1986) ("Beginning at least as early as the middle of the nineteenth century and continuing until the very time that Congress considered

180.260 Service of process by department employees. (1) Notwithstanding ORCP 7 E. or any other law, employees and officers of the Department of Justice other than attorneys may serve summons, process and other notice, including notices and findings of financial responsibility under ORS 416.415, in litigation and other proceedings in which the state is interested. No employee or officer shall serve process or other notice in any case or proceeding in which the employee or officer has a personal interest or in which it reasonably may be anticipated that the employee or officer will be a material witness.

(2) The authority granted by subsection (1) of this section may be exercised only in, and within reasonable proximity of, the regular business offices of the Department of Justice, or in situations in which the immediate service of process is necessary to protect the legal interests of the state. [1989 c.323 §2]

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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

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

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

Karen K. Creason

cc: Mr. Dan Field, Oregon Association of Hospitals

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

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

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

H.(2) Certification in lieu of appearance:

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

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

at the 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 . . .