COUNCIL ON COURT PROCEDURES

Minutes of Meeting of May 9, 1992

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

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

(Also present were: Maury Holland, Acting Executive Director; Gilma Henthorne, Executive Assistant; Attorneys Dennis Hubel and Charlie Williamson.)

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

Agenda Item No. 1: Approval of minutes of meeting held March 14, 1992. The minutes of the meeting held March 14, 1992 were unanimously approved.

Agenda Item No. 2: Passing of Fred Merrill; appointment of Acting Executive Director; search for new Executive Director (Chair). The Chair expressed deep regret concerning the loss of the Council's Executive Director, Fred Merrill, who passed away on April 8, not only because of the personal attachments but because of the vast store of knowledge which Fred possessed. The Chair stated that as a part of his effort to establish a level of continuity, he had asked Maury Holland to serve as Acting Executive Director and Maury had graciously agreed to serve without prejudice to anyone who might apply for the Executive

Director position. The Chair said that Maury had also applied for the position on a permanent basis. The Chair stated that the information concerning the position had not been generally disseminated, although he had spoken with representatives of the University of Oregon School of Law and Northwestern School of Law. The Chair also said he has been in contact with the Personnel Department in the State Court Administrator's Office and was in the process of receiving documents to determine any budgetary constraints in hiring a new Executive Director. The Chair asked whether any Council members wished to volunteer to assist the Chair in the selection process.

Agenda Item No. 3: Posthumous honors to Fred Merrill (John Hart and Ron Marceau). Ron Marceau announced that he had presented an application to the Bar for the Bar's Award of Merit and the President's Award, both as posthumous honors to Fred. Maury Holland stated that Fred knew he was to be the recipient of the Meritorious Service Award at the Lane County Bar Association dinner which took place three days after Fred passed away; the award was presented posthumously. John Hart said that the certificate of appreciation which had been prepared for Fred's outstanding service had been signed by the Governor and other dignitaries.

Agenda Item No. 4: Six-person juries (Ron Marceau and attached letter from Judge Barron). The Chair stated that the Oregon State Bar Procedure & Practice Committee was meeting this morning at the Bar center and that the six-person jury issue was on the agenda. Ron Marceau suggested this agenda item be deferred until later in the meeting so that the Bar committee could report concerning their deliberations on the issue.

Agenda item No. 5: Class actions (Janice Stewart and letters from Oregon Division of State Lands and R. Alan Wight -- letters attached to the agenda for this meeting). Janice Stewart said that her first goal as committee chair was to see what kind of response there would be from the defense bar regarding the proposed changes. Up until recently, she had been having difficulty in trying to secure those comments. From the comments that had been received, there appeared to be a real opposition to doing away with the notice provision or the claim forms provision for plaintiffs. She said that the concern seems to be that the defense bar wants to make sure that if they settle, which happens more often than not with class actions, they want to know with whom they are settling so that they can buy their peace and gain a res judicata effect. She stated that some historical research had to be done with respect to the changes in 1981. She said that the subcommittee had to collect more comments, including those from the Bar's Procedure & Practice Committee, and then get some drafts and recommendations to the Council. She stated that the subcommittee needed to have instruction regarding deadlines and guidance as to whether a public hearing on the proposed

changes should be held before the subcomittee or before the Council as a whole.

In response to Ms. Stewart's concerns regarding deadlines, the Chair pointed out that, in past biennia, the Council had established a cutoff in August for all proposed amendments to the ORCP so that they could be published in the Advance Sheets in August, thus allowing sufficient time to elicit comments from the Bar prior to final action being taken by the Council in December. However, the Chair said that the Council was not prohibited by statute or rules of procedure from proposing additional amendments after August. The Chair asked Maury Holland to find out the publication schedule for the Advance Sheets and the cutoff dates for submission of materials to the Publications Section.

The Chair thought that the Council should attempt to take final action, meaning tentative rulemaking, at the August 1 meeting in East Portland and that comments and responses to the proposed amendments could be heard at the meetings held in September, October, and November. He stated that any amendments to the rules would then be promulgated at the December meeting.

Janice Stewart was concerned regarding the manner of publicizing public hearings. It was pointed out that the Council's meeting schedule for the 1991-93 biennium (also specifying the public meetings, including the August 1 meeting) had previously been published in the Bar's publication, For the Record. Ron Marceau stated that in the past specific notice had been given to OADC and OTLA and all obviously interested groups. Ron Marceau said he was very much in favor of the subject of class actions being heard before the full Council so that the Council would be better able to defend its position in the event of any legislative proposal on the subject.

Maury Holland reported that he had done some historical research and said that there had been a full array of class action reform proposals worked on by the Council in 1980 which were then considered by an Attorney General Opinion. Maury Holland said that the legislature rejected many of the proposals due to some intensive opposition and felt that any proposals this biennium might again be strongly opposed in the legislature, emphasizing that great care should be taken by the Council to avoid criticism that we short-circuited appropriate procedures for input and comment.

The Chair asked the class action subcommittee to give the Council a report or recommendations relating to procedural issues, as well as any related substantive matters that would have to be dealt with by the legislature, at the June 13 meeting in Ashland. At this point, the Chair discussed the Council's meeting schedule for the remainder of the year; the revised

meeting schedule is attached to these minutes.

The Chair said that he had received additional letters pertaining to class actions and that they would be distributed to the Council prior to the next meeting.

Agenda Item No. 6: Subpoenas without trial or deposition and hospital records (Executive Director's 3-12-92 memorandum (attached to these minutes) and letters from Art Johnson, James Lemieux, Kent Ballantyne, and Larry Thorp -- letters attached to agenda for this meeting). The Chair asked the members for their thoughts about the suggestion that the Oregon Association of Hospitals, the Oregon Medical Association, and the Oregon Society of Hospitals be given more of an opportunity to comment on the proposed rules and perhaps participate in a task force to discuss the issue of subpoenaing hospital records. The Chair said his concern was that it was somewhat unlikely that it could be finished in time to included as a rule amendment by August.

Bruce Hamlin suggested that the Council consider the Executive Director's 3-12-92 memorandum. Mike Phillips felt that the March 12th memorandum accomplished what was needed, i.e. it made sure that hospital subpoenas come into the system in a way that all parties can use them, and that the memorandum also solved Karen Creason's concerns. Mike Phillips made a motion, seconded by Judge Liepe, that the Council adopt the proposals made in the 3-12-92 memorandum.

Ron Marceau stated that Dennis Hubel, who is the liaison from the Bar's Procedure & Practice Committee to the Council, would be attending the Council's meeting directly and might have some thoughts on the subject. The Chair suggested that this matter be deferred until later in the meeting.

Agenda Item No. 7: Oaths for deposition by telephone (Bruce Hamlin and Mike Phillips). Bruce Hamlin had distributed proposed amendments to Rules 38, 39, and 46 prior to the meeting (they are also attached to these minutes). Bruce Hamlin stated that he and Mike Phillips had tried to incorporate suggestions made by the Council members at the February 8th meeting; they wanted to make it clear that an oath could be given during a telephone deposition over the telephone whether the deponent was located within this state or outside this state (that was designed to clear up any ambiguity with ORS 44.320). Bruce Hamlin explained the proposed amendments to Rules 38, 39, and 46 (see attached).

The Chair asked how the language proposed to be added to Rule 39 C(7) concerning "testimony ... taken by telephone other than pursuant to court order or stipulation made part of the record, ..." would bear upon either an oral stipulation at the deposition or a written stipulation, such as a letter between

counsel, not customarily made part of the record. Mike Phillips replied that the language was included because he and Bruce Hamlin thought it was the sense of the Council at its last meeting that there should be two clearly stated ways of taking depositions by telephone -- court order or a written stipulation made part of the record of the deposition, by reading the stipulation into the record or attaching it as an exhibit to the transcript. Inadvertent failure by counsel to comply with this procedure, when there is no court order, should be readily avoided or cured by the proposed language providing that any objections to the taking of a deposition by telephone are waived unless seasonably made at the taking of the deposition.

The Chair questioned the language in 39 (E) on page 4 of the draft: "Those described in Rule 46 B(2) shall present the motion ... in which the action is pending." He wondered to whom the term "Those" made reference. After discussion, a suggestion was made to insert the word "persons" between "Those" and "described". Regarding 39 (C)(7), Judge Liepe suggested deleting the words "upon motion" in the second line of the draft so that the court's discretion would be clear.

The Council then considered the language in 46 A(1) and B(1). After discussion, a suggestion was made that the word "competent" be substituted for "general" in the first sentence of 46 A(1) so that it would read as follows: "... such application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located." A discussion followed about whether the language in 46 B(1) should be made consistent with the underlined language in 46 A(1).

Judge DeMuniz raised the question about whether the language in 46 B(1) would be utilized by, for example, a Texas judge to find someone in contempt and felt that we would not be able to do anything in Texas.

After further discussion, Mike Phillips made a motion, seconded by Judge Welch, that the Council adopt the amendments as originally written by Bruce Hamlin, with the exception that, in the second line of 39 C(7), the words "upon motion" be stricken. He amended his motion, seconded by Judge Welch, so that in Rule 46 A, in the underlined language, the word "general" would be stricken and the word "competent" would be substituted. Bruce Hamlin pointed out that in B(1), in the heading, the phrase "the Deponent Is located" should be substituted for "the Deposition Is Located." Janice asked whether the amendment to 46 A(1) would also apply to 46 B(1), and Mike Phillips said that it would not apply and that Judge DeMuniz was correct in pointing out that 46 B(1) is designed to address holding someone in contempt in Oregon.

Mike Phillips' motion was further amended by Judge

McConville to insert "persons" between "Those" and "described" at the beginning of the underlined language in 39 E. It was also decided after discussion that the word "applications" in the underlined language in 46 A(1) should be changed to "application".

The motion as amended passed with 18 in favor and one opposed.

Agenda Item No. 8: Revised meeting schedule (Chair). This agenda item was discussed under Agenda Item No. 5 above.

The Council then returned to the discussion of the proposed amendments to Rule 55 (**Agenda No. 6**) regarding subpoenas without trial or deposition and hospital records. The Chair asked Dennis Hubel if the Bar's Procedure & Practice Committee had dealt with that issue. Mr. Hubel said that they had been attempting to make the procedures in 55 F and 55 H more alike rather than less alike, that they had learned of the concerns of Karen Creason and the Oregon Hospital Association, and that they had just recently seen the Executive Director's 3-12-92 memorandum but had not had an opportunity to discuss it. He said the Bar's committee felt that the amendments to Rule 55 promulgated in the 1989-91 biennium dealt with the problem adequately.

The Chair asked Dennis Hubel and Charlie Williamson to circulate the Executive Director's 3-12-92 memo to OADC and OTLA, respectively. The Chair also asked Maury Holland to contact the people identified in the attachments to the agenda for this meeting, including Larry Thorp. The Chair stated that a report from the Bar's committee would be very much appreciated for the June 13 meeting in Ashland.

The Council then returned to **Agenda Item No. 4**, six-person juries (see attached report from Judge Barron). Dennis Hubel said that the Bar's committee had just voted on the six-person jury issue and the result was unanimous opposition on the part of plaintiffs' lawyers and defense lawyers and family practitioners and that the committee was in the process of drafting a proposal to the Council. He said their concern was the Los Angeles study indicating that minority participation in a six-person jury might be affected, particularly in light of the recent current events in Los Angeles as a result of the Rodney King verdict. Referring to Judge Barron's memo, he thought that the reduction of civil jury trials during the period 1982 to 1991 was very significant and that it would result in far greater savings to the system than reducing the number of jurors. He felt the emphasis should continue to be on alternative dispute resolutions, settlement conferences, etc., rather than changing the number of jurors.

Judge Barron said that he thought Rule 56 should be changed to reflect that there cannot be less than six jurors since the

Oregon Constitution seems to say that. He said he had also drafted a provision in answer to a concern that was raised at the last meeting when a juror becomes ill during deliberations.

Ron Marceau said he thought that the threshold question is whether reduction to a 6-person jury would degrade the quality of justice; his opinion was that it probably would not. He said that a couple hundred thousand dollars in savings, as indicated by Judge Barron's analysis, might sound like a lot of money to some legislators. He thought there was lack of data regarding the constitutional question, i.e. three-quarters of a jury applied to six. He also reiterated some of Judge Panner's and Judge Rossman's views presented at the Council's March 14th meeting..

After further discussion, John Hart made a motion, seconded by Janice Stewart, to not change the 12-person jury to a 6-person jury. Janice Stewart said that she did not mind a 6-person jury in federal court because there it is a unanimous verdict. She stated her concern was that in Oregon the constitution says that three-fourths of a jury can render a verdict, i.e. five people could decide. She said she did not think there was sufficient cost savings to warrant the change. The Council voted on the motion, with 10 in favor of not changing the number of jurors, 4 were opposed to the motion, and there were 4 abstentions. It was pointed out that a quorum was present and a majority declined to change the rule.

The Chair asked Ron Marceau to draft a report to the legislature detailing Council action and explaining the Council's position on six-person juries; the Chair also suggested that the Executive Committee of the Council could send a separate letter to the legislature on the same subject. Ron Marceau reminded the Council that, if there is a legislative proposal changing the 12-person jury to a 6-person jury, the Council should be prepared to appear in opposition to any such proposal unless a majority of the Council feels otherwise between now and then.

Agenda Item No. 9: Oregon Dispute Resolution Commission (Chair). The Chair explained that there had been a request from the Oregon Dispute Resolution Commission to the Council on Court Procedures, as well as to many other law-related organizations, to send a representative to become part of an Advisory Committee on Court Panels and Procedures (a part of the Dispute Resolution Commission). After discussion, the Chair announced that he would inform the Commission that the Council would not be sending a regular representative to participate on their Advisory Committee.

Referring back to the six-person jury issue, Judge Barron asked whether anything should be done about the alternate jury proposal he had made (allowing alternate jurors to participate in

deliberations). The Chair said that the matter would be placed on the agenda for the June 13th meeting. In the meantime, he said he would ask Dennis Hubel and Charlie Williamson to bring it to the attention of OTLA and OADC so that the Council could have the benefit of their comments, as well as different language if Judge Barron's proposal did not solve all the problems identified. Bernie Jolles said that if the Council stays with the 12-person jury, he did not think the proposal was practical because of the total number of jurors involved. The Chair asked Maury Holland to check the federal rule regarding this question.

The meeting was adjourned at 11:38 a.m.

Respectfully submitted,

Maurice J. Holland
Acting Executive Director

MJH:gh

COUNCIL ON COURT PROCEDURES
REVISED MEETING SCHEDULE
JUNE - DECEMBER 1992

June 13	City Council Chambers, Civic Center, 1155 East Main Street, Ashland (PUBLIC MEETING - SECOND CONGRESSIONAL DISTRICT)
August 1	Multnomah County Sheriff's Office, The Hansen Building, 12240 N.E. Glison, First Floor, Portland (PUBLIC MEETING - THIRD CONGRESSIONAL DISTRICT)
September 26	Seaside Civic & Convention Center, 415 First Avenue, Seaside (PUBLIC MEETING - FIRST CONGRESSIONAL DISTRICT)
October 17	Oregon State Bar Center, 5200 Southwest Meadows Road, Lake Oswego
November 14	Oregon State Bar Center, 5200 Southwest Meadows Road, Lake Oswego
December 12	University of Oregon School of Law, Rm. 375, 1101 Kincaid Street, Eugene (PUBLIC MEETING - FOURTH CONGRESSIONAL DISTRICT)

March 12, 1992

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: **Fred Merrill, Executive Director**

RE: **Agenda Item No. 5 - March 14, 1992 meeting**

I have consulted with Karen Creason and Larry Thorp regarding amendments to ORCP 55 H to solve the problem of the relationship between hospital records and a subpoena duces tecum without a deposition, hearing, or trial. We suggested the following changes to ORCP 55 H would solve the problem and would be consistent with the Council's intent in making the amendments last biennium.

DELETED LANGUAGE IS BRACKETED; NEW LANGUAGE IS UNDERLINED AND IN BOLDFACE.

SUBPOENA
RULE 55

* * * *

H. Hospital records.

* * * *

H.(2) **Mode of compliance.** Hospital records may be obtained by subpoena duces tecum as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met.

H.(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i)

if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business[; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena]. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than 14 days prior to service of the subpoena on the hospital.

NOTE BRACKETS

* * * *

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 other than in connection with a deposition, hearing, or trial.

H.(4)[(a)]**(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.

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FRM:gh

RULE 38. PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

A. Within Oregon.

A(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A(2) For purposes of this Rule, a deposition taken pursuant to Rule 39C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

B. Outside the State. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable

or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign Depositions.

C(1) Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

C(2) This section shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of those states which have similar rules or statutes.

RULE 39. DEPOSITIONS UPON ORAL EXAMINATION

A. (unchanged)

B. (unchanged)

C. Notice of Examination.

C(1) (unchanged)

C(2) (unchanged)

C(3) (unchanged)

C(4) (unchanged)

C(5) (unchanged)

C(6) (unchanged)

C(7) *Deposition by Telephone.* Parties may agree by stipulation or [T]the court may upon motion order that testimony at a deposition be taken by telephone[,]. If testimony at a deposition is taken by telephone pursuant to court order, [in which event] 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 other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. 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.

D. (unchanged)

E. Motion to Terminate or Limit Examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted

or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36C. Those described in Rule 46B(2) shall present the motion to the court in which the action is pending. Other non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46A(4) apply to the award of expenses incurred in relation to the motion.

F. (unchanged)

G. Certification; Filing; Exhibits; Copies.

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. **(Remainder unchanged.)**

H. (unchanged)

I. (unchanged)

RULE 46. FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, such applications may also be made to a court of general jurisdiction in the political subdivision where the deponent is located. [to a judge of a circuit or district court in the county where the deposition is being taken.]

A(2) **(unchanged)**

A(3) **(unchanged)**

A(4) **(unchanged)**

B. Failure to Comply With Order.

B(1) *Sanctions by Court in the County Where [Deposition Is Taken] the Deposition Is Located.* If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the [deposition is being taken] deponent is located, the failure may be considered a contempt of court.

B(2) **(unchanged)**

B(2)(a) **(unchanged)**

B(2)(b) **(unchanged)**

B(2)(c) **(unchanged)**

B(2)(d) **(unchanged)**

B(2)(e) **(unchanged)**

B(3) **(unchanged)**

C. **(unchanged)**

D. **(unchanged)**

H14

CIRCUIT COURT OF OREGON
Fifteenth Judicial District

RICHARD L. BARRON
Judge

Coos County Courthouse
Coquille, Oregon 97423
396-3121

March 18, 1992

Ronald L. Marceau
Attorney at Law
Suite 300
1201 NW Wall Street
Bend, OR 97701-1936

Re: Six person juries

Dear Mr. Marceau:

Enclosed please find some proposed changes to Rules 56 and 57 and discussion of the proposed changes.

For your information the following table indicates the total number of civil (includes a very small number of domestic relations cases) and criminal jury trials in circuit court and the percentage of the total number of cases terminated in circuit court by jury trial from 1982 through 1991:

Year	Civil	Criminal	Percentage
1982	1549	995	3.4
1983	1121	1113	2.9
1984	1038	1049	2.8
1985	1027	1146	2.9
1986	904	1075	2.2
1987	900	1040	2.2
1988	960	1120	2.3
1989	716	1137	1.9
1990	617	1030	1.4
1991	655	1055	1.4

In 1982 the total number of cases terminated by the circuit courts was 75,127. The total number of cases terminated by the circuit courts in 1991 was 125,921.

The cost savings in reducing civil juries from 12 to six persons over a biennium would be small in relation to the judicial department's total budget. If 25 jurors are called in for a 12 person civil jury trial, the number could be reduced to 16 for a six person civil jury trial. Each juror receives $10.00 a day for jury service and eight cents a mile for mileage. The system would save the cost of nine jurors the first day of trial and the cost of six persons for each day thereafter. If the average civil jury case lasts two days, the system would save $150.00 plus for each jury trial. Using the 1991 civil jury trial figure, the savings

for two years would be a little over $200,000.00.

There would be a time savings in selecting a jury, but it would probably not be more than 30 minutes to an hour. Some courts may be able to reduce the length of jury service for citizens because of the reduced number of jurors needed for each jury in a civil case.

As I stated at the Council's meeting on March 14, 1992, I have no strong opinion on the subject of six person juries for civil cases, but feel the Council might want a proposal to look at and might want some information on the number of civil jury trials and the cost savings to the system by reducing civil juries from 12 to six persons.

I do plan to raise this issue at the presiding judges' meeting following the Judicial Conference in April. I might also raise it at the Judicial Conference.

Sincerely,

Richard L. Barron
Presiding Judge

cc. Henry Kantor
Attorney at Law
1400 Standard Plaza
1100 SW 6th Avenue
Portland, OR 97204-1087

In Rules 56 and 57 matter in parentheses is omitted and matter underlined is added

Rule 56 Trial by Jury
Trial by Jury Defined

A trial jury in the circuit court is a body of (12) six persons drawn as provided in Rule 57. (The parties may stipulate that a jury shall consist of any number less than 12 or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.)

Discussion

Oregon Constitution, Amended Article VII, section 7 states, "In civil cases three-fourths of the jury may render a verdict(,)" and section 9 states, "Provision may be made by law for juries consisting of less than 12 but not less than six jurors."

In light of the above provisions Rule 56 should be amended by eliminating the second sentence. Section 9 of Amended Article VII is clear. There cannot be a jury of less than six persons in Oregon. Although section 7 is not quite as clear as section 9, it appears to require that at least three-fourths of all jurors agree upon a verdict. Without amending the Constitution it is not advisable to allow a statute, rule or stipulation to lessen the number of jurors or the number of jurors required to reach a verdict.

If the Council wishes to recommend that civil cases in circuit be tried by six person juries, it can amend Rule 56 as indicated above in the first sentence of the rule.

F. Alternate Jurors

F(1) Alternate Jurors; how drawn. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retired to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges , shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. (An alternate juror who does not replace a regular juror shall be discharged as the jury retires to consider its verdict.) Each side is entitled to one peremptory challenge in addition to those otherwise allowed by these rules or other rule or statute if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory

challenges allowed by these rules or other rule or statute shall not be used against an alternate juror.

F(2) Alternate jurors; deliberations. The court may allow not more than two alternate jurors in the order in which they were called to retire with the jury to consider its verdict. An alternate juror may participate in the jury's deliberations, but not in reaching a verdict unless it is necessary for an alternate juror to replace a juror who becomes or is found to be unable or disqualified to perform the duties of a juror. The manner of replacing a juror with an alternate juror during deliberations is the same as is set forth in Rule 57 F(1) for replacing a juror with an alternate juror prior to the time the jury retires to consider its verdict.

Discussion

At the Council meeting on March 14, 1992 Judge Panner stated that he allowed alternate jurors to retire with the jury, participate in deliberations and participate in reaching a verdict. It appeared that several Council members felt that provision should be made for a similar procedure in Oregon circuit courts because of the possibility that a juror could be unable to continue to serve or disqualified from serving on jury during deliberations.

Rule 57F allows alternate jurors to be chosen, but requires their discharge before the jury begins deliberations. The above proposal divides Rule 57F into two sections. Proposed Rule 57F(1) remains the same as the present rule except the sentence requiring that alternate jurors be discharged before the jury begins deliberations is omitted. All of proposed Rule 57F(2) is new. It allows not more than two alternate jurors to retire with the jury and participate in deliberations. It does not allow the alternate jurors to participate in reaching a verdict. The remainder of proposed Rule 57F(2) tracks the language of proposed Rule 57F(1) as it relates to the procedure of replacing jurors with alternate jurors during deliberations.

It is practicable and cost-effective to allow alternate jurors to retire with the jury to avoid mistrials in situations where a juror is unable to continue to serve or is disqualified from serving during deliberations. The procedure could allow the alternate jurors to retire, but not participate in deliberations or in reaching a verdict or vice versa. Neither of these alternatives is attractive. It would be awkward and could be distracting to allow up to two people to retire with the jury, but not allow them to participate. It would be unrealistic to expect the alternate jurors to remain silent during the jury's deliberations. Allowing the alternate jurors to fully participate would change the number of jurors on the jury and change the number of jurors needed to reach a verdict.

The procedure set forth in proposed Rule 57F(2) allows alternate jurors to participate in the jury's discussions and to possibly have some impact upon the verdict that is reached. The proposed rule does not allow the alternate jurors to participate in reaching the verdict. In this way the number of jurors on the jury

is not changed and the number of jurors needed to reach a verdict is not changed. Further, the six persons the parties selected as their jury reaches a verdict, but with the presence of the alternates, the parties are protected from a mistrial if a juror is unable to continue to serve or is disqualified from serving during deliberations.