COUNCIL ON COURT PROCEDURES

Minutes of Meeting of February 27, 1993
9:30 a. m.

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

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

Also present were Maury Holland, Executive Director, and Bob Oleson, Oregon State Bar Public Affairs Director, for a portion of the meeting.

Chair Henry Kantor called the meeting to order at 9:37 a.m.

Agenda Item No. 1: Approval of minutes of meeting held December 12, 1992. The Chair asked whether there were any comments, corrections or additions to the minutes of the Dec. 12, 1992 meeting as previously circulated, and hearing none, declared without objection that they would stand approved.

Agenda Item No. 2: Old business. The Chair asked whether anyone had any item of old business to raise. Maury Holland stated that some typographical errors had been discovered on p. 14 of "Amendments to Oregon Rules of Civil Procedure Promulgated by Council on Court Procedures: December 12, 1992." He distributed to the Chair and all members present a corrected page 14, and said that copies thereof would be forwarded to excused members. He also stated that these corrections had been agreed upon with the Legislative Counsel.

Agenda Item No. 3: Consideration of Pending Bills. The Chair asked Maury Holland to summarize what he knew about each of the currently pending bills pertinent to the ORCP and the work of the Council attached to his Feb. 18 '93 memo. (A copy of this memo with attachments is attached to the file copy of these minutes.)

Holland responded that **SB 215**, while broadly similar to the corresponding amendment of R. 39 C. (7) promulgated by the Council at its 12/12/92 meeting, was different in that the former would disallow telephonic depositions pursuant to informal agreement and would require either a court order or written stipulation entered of record. He stated that **SB 253** differed from the corresponding amendment of the summons warning promulgated by the Council in that the language proposed by the bill would highlight the means of obtaining an attorney if a person served did not already have one.

Several Council members expressed concerns about both of these bills. The Chair reported that he had received from Susan Evans Grabe, OSB Law Improvement Coordinator, word that Counsel to the Senate Judiciary Committee has agreed that no hearings would be scheduled on either of these bills; an agreement was further evidenced by a letter from Grabe to William E. Taylor, Jr., counsel to the Senate Judiciary Committee, a copy of which was provided by the Chair for the Council's files.

Maury Holland proceeded to **SB 340**, which he reported would in substance adopt the new sections of R. 36 regarding modification of protective orders considered but not promulgated by the Council, though with some important differences in detail. Several members expressed criticisms of the amending language of this bill having to do with some apparent drafting flaws and also some policy concerns. The issue then arose as to what, if any, action the Council should take in light of the similar proposal before it at its Dec. 12, 1993 having been tabled. There was general agreement that Henry Kantor, as Chair, should notify the

Chair of the Senate Judiciary Committee by letter of what had taken place in the Council concerning the proposed discovery-sharing amendment, which he stated he would do. As of the date of this meeting, no committee hearing had been scheduled on this bill. It was noted that since the deadline for scheduling committee hearings had not yet arrived in the current session, the fact that no hearing had yet been scheduled on this bill did not provide assurance that none would be, possibly on very short notice. The Chair asked Maury Holland to notify all excused Council members of what was decided upon regarding SB 340.

An extended discussion then followed concerning **HB 2360**, in which Bob Oleson participated on behalf of the OSB. Mr. Oleson reported that Rep. Mannix, sponsor of this bill, has long left that the Council as currently empowered represents an excessive delegation of legislative authority and that he is serious about reducing the Council's role to that of an advisory body. Mr. Oleson said that he was not aware that Rep. Mannix had been prompted to introduce this bill at this particular time by any recent events in the Council's history, or by any specific thing it has done or failed to do. He further stated that he expects that this bill will probably enjoy quite substantial support from various interest groups that for one reason or another have become unhappy with the Council, although he was unable to identify what these groups might turn out to be. He reported that the OSB was prepared officially to oppose this bill and to work with the Council in that regard, provided the Council also decides to oppose it.

The Chair asked for an expression of opinion whether the Council should take any official position regarding this bill, and if so, what position. Bruce Hamlin moved, seconded by Ron Marceau, a resolution that the Council oppose this bill officially and as effectively as possible, which was adopted by unanimous voice vote. There followed discussion of factors and considerations that might be identified and articulated as being both the most valid and the most persuasive reasons why the Council should retain its current limited law-making role. There was general agreement that the ORCP have constituted, and continue to constitute, a remarkably good set of procedural rules and that the work of the Council over the years of its existence is one reason this is so. Among the advantages offered by the Council and its method of operation, it was noted, is the opportunity they afford to give serious consideration to proposed amendments in a manner that is both quite intensive and yet takes place over the considerable span of time represented by a biennial cycle. Both Council members and those who appear before it to advocate or oppose rules amendments take the Council's decision-making processes more seriously than either would be likely to do were the Council merely an

advisory body. This seriousness of preparation and deliberation must certainly help result in a better quality work product in the form of those rules amendment as finally promulgated. Similarly the Council might be thought to offer a forum in which "pro-plaintiff" and "pro-defendant" views gain more balanced consideration than would be the case if the judiciary committees of the legislature were to become the primary fora for procedural reform. Additionally, several members pointed out that the Council accomplishes a tremendous amount of hard work and expends great amounts of time which, if it did not exist or existed in a merely advisory capacity, almost certainly would either fall to the members of the judiciary committees during a hectic legislative session or would not get done at all.

Discussion then turned to how effective opposition to this bill would be organized. It was agreed that the Council, and especially the Chair and Executive Director, would coordinate matters closely with Bob Oleson, keeping him currently informed on all steps and plans being contemplated. It was noted that HB 2360 is scheduled for hearing on Wednesday, March 17, at 1:00 p.m., before the House Judiciary Subcommittee on Civil Law and Judicial Administration in Rm. 357 of the State Capitol. In addition to the Chair and Executive Director, who will be present at this hearing and prepared to testify as needed, there was discussion of what other individuals might be available to testify most effectively in opposition. There was general agreement that individuals who had been prominently involved in creating the Council in its present form might be more persuasive witnesses in opposition than those currently involved with it, and the names of several such individuals were mentioned. Maury Holland was asked to look into the legislative history surrounding the creation of the Council, with particular reference to a substantial research memo done at the time that concerned primarly separation-of-powers considerations. Holland was asked to coordinate this research with Bruce Hamlin, who was Fred Merrill's research assistant during the time the Council was being created and structured in its present form. The Chair also directed Holland to ensure that absent Council members are fully informed about the decision to oppose HB 2360 and the plans for expressing this opposition, and that their comments and suggestions are solicited.

Maury Holland then reported that, on behalf of the Council, John Hart wrote a letter addressed to all legislators expressing its opposition to HB 2497 that would amend R. 56 and 59 G to reduce the number of civil jurors from 12 to 6. This letter was introduced into the record of the hearing on this bill by the Civil Law and Judicial Administration Subcommittee of the House Judiciary Committee on Feb. 9, 1993 by prior

arrangement with Stephen C. Thompson, who testified in person at this hearing in opposition to the bill. Several members noted that this reflected an official position of the Council in opposition to reduction in the size of civil juries, and not merely an "unofficial consensus position," as characterized in Holland's Feb. 18 covering memo.

Finally, there was general agreement that there is no need for the Council to comment in any form on **HB 2562**, which would impose insurance requirements on certain persons serving summonses.

There followed some discussion about how the Ways & Means hearing on **HB 5045** to appropriate Council funding for the 1993-95 biennium and scheduled for March 5, would be covered. The Chair stated that he now expects to be at another hearing at the time the Council's budget hearing is scheduled, and hoped that John Hart, as Vice Chair, will be able to attend along with Maury Holland. The Chair urged Holland to confirm arrangements with Hart as soon as possible

Agenda Item No. 4: New business. The Chair called for any items of new business. Maury Holland then distributed sets of copies of other pending bills that deal in one way or another with civil practice, some of which would amend the ORCP, but would not, in contrast to the bills discussed under item no. 3 above, modify or otherwise affect any of the rules amendments promulgated Dec. 12, 1992. Included in this set were **SB 307, SB 308, 372; HB 2504, 2637, 2665, 2709, 2779, 2781,** and **2855**. The Chair urgently requested that all members examine these bills as promptly as possible, and notify him which, if any, of them in their opinion should be responded to by a letter to the pertinent judiciary committee chair pointing out that the procedural changes in question had not been proposed to the Council and requesting that legislative action be deferred until the Council is given opportunity to consider them during the course of the 1993-95 biennium.

Maury Holland expressed concern that a very large number of Council members would be leaving the Council because of expiration of their terms. He asked whether there was some acceptable way in which those members who are completing their terms, but are eligible for reappointment to additional terms, might be informed of such eligibility and asked whether they would accept reappointment so that reappointment could be recommended to the Board of Governors or other appointing authority. Holland made it clear, however, that he did not think it appropriate for him as Executive Director to recommend either initial appointments or reappointments to the Council, and would strictly refrain

from doing this despite occasional requests that he do so. The Chair suggested that Holland notify each members whose term is expiring of that fact, along with whether he or she is eligible for reappointment. Holland said that, in addition to that, he would follow past practice and, during the summer, notify each of the appointing authorities by letter of any vacant positions which they are respectively authorized to fill. He added that he would like to be further advised on whether such letters should mention the possibility of reappointment where pertinent.

David Kenagy responded to an inquiry from the Chair to the effect that there was as yet nothing new to report from the committee appointed to study possible amendments to R. 55, particularly concerning subpoenaing of hospital records.

There being no further new business, the meeting was adjourned at 12:05 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

February 18, 1993

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

FROM: Maury Holland, Executive Director M.J.H.

RE: **2/27/93 Meeting; Bills Pending in Legislature**

Attached are texts of bills currently pending in the Legislative Assembly that have some pertinence to the Council. Together with this memo, these are intended to flesh out item 3 of the agenda for our February 27 meeting previously circulated with the notice of said meeting. Following are my brief comments about each of the attached bills, summarizing the limited information I have concerning them:

1. **SB 215** would amend ORCP 39 C.(7) in a manner that differs substantially from the amendment to this subsection promulgated by the Council 12/12/92. The most important difference is that SB 215 would authorize telephonic depositions only by court order or pursuant to written stipulation entered of record. The Council's amendment, by contrast, would authorize telephonic depositions pursuant to informal agreement among counsel. My recollection is that, in the Council's discussion of this amendment, many thought it important not to disallow telephonic depositions by informal agreement. The latest information I have on the status of this bill is that it has been referred to the Senate Judiciary Committee, but no hearings have yet been scheduled.

2. **SB 253** would amend the language of the "summons warning" contained in ORCP 7 C. in a manner very slightly different from the version promulgated 12/12/92 by the Council. This bill would add the words: "If you do not have an attorney," in lieu of the Council's: "If you need help in finding an attorney, ..." The Council received a letter urging adoption of the language of this bill. This bill has been referred to Senate Judiciary, but no hearings have been scheduled.

3. **SB 340** would essentially adopt, as new subsections ORCP 36 C.(2) and (3), the provision for "discovery sharing" considered but not adopted by the Council last year. The bill deals with the issue that especially concerned the Council in proposed C.(3) to the effect that protective orders entered upon written stipulation would not be subject to modification under C.(2) if such stipulation expressly so provides. This bill has been referred to Senate Judiciary, but no hearings have been scheduled to date.

4. **HB 2360.** This is obviously the most important bill introduced thus far from the Council's perspective. It would leave the Council intact, but would change its function from promulgating rules amendments having the force of law unless affirmatively overridden by the Legislature to that of merely recommending rules amendments to the Legislature. The bill would also nullify the amendments promulgated 12/12/92, which means they would not become law unless, and only to the extent, they are enacted by the current Legislative Assembly. Henry Kantor has been in touch with Rep. Del Parks, Chair of House Judiciary, to which this bill has been referred. Our present best information is that the initial hearing on this bill will be on March 17 at 1:00 p.m., but that is not yet official. At a minimum, Henry and I will appear prepared to testify as to the Council's official position on this bill, and Henry might well enlist others.

Some of you might have a firm indication of what has prompted this proposal at this particular time. My surmise, and it is no more than that, is that this bill is seriously intended, not just some shot across the bow inspired by some disgruntled judge or lawyer. My further surmise is that the rationale behind this bill is something to the effect that, as time goes on, an increasing number of ORCP provisions are of legislative derivation. The current biennium has furnished some examples of the Council holding back in exercising its best procedural judgment out of deference to that fact. For instance, during the course of the Council's debate about whether to abolish the claim form procedure, one experienced member argued that, even were the Council to conclude that this represents bad procedure from a purely procedural point of view, it should not even communicate that conclusion to the legislature unless it was also prepared to overcome its scruples about affecting substantive rights by promulgating a repealing amendment. Assuming this bill reflects the considered view of Rep. Mannix, and knowing him to be a very bright lawyer, my guess is that the argument Henry will have to rebut, assuming the Council decides officially to oppose this bill, is that given the likelihood of ever-increasing legislative intervention into the ORCP over time, making the Council advisory to the legislature would make it a more useful body by freeing it from its current self-imposed reticence about touching any provision having a legislative origin. In other words, at this juncture, I think we should consider whether this bill might well be intended as a friendly proposal, intended to enhance the Council's usefulness, and not at all hostile. It would be impolitic for me to try to contact Rep. Mannix to simply ask him what his thinking is, but that would not apply to you as Council members.

5. **HB 2497** would amend ORCP 56 and 59 to provide for six-person juries in civil cases and to prescribe majorities required to agree to verdicts. The Council decided not to take an official position on this issue, which was anticipated would arise during the current session. John Hart has sent a letter to

all legislators expressing the Council's unofficial consensus opinion that twelve-person juries should be retained. I am not aware that anything further needs to be done by the Council.

6. **HB 2562** would not amend ORCP 7 E or other rule provision, but would enact a statute requiring that anyone serving a summons for a fee would have to have a $100,000 certificate of errors and omissions insurance on file with the Secretary of State. This would not apply to sheriffs, sheriffs' deputies of "employees of an attorney." Early in this biennium the Council declined a proposal that it impose this requirement by rule amendment. This bill has been referred to the House Judiciary Committee, but no hearings have been scheduled.

7. **HB 5045** would appropriate the Council's 1993-95 budget. This has been referred to Ways & Means, but no hearing has yet been scheduled

There are some other bills pending that relate to civil practice generally, but not in ways pertinent to the Council or the ORCP. My favorite to this point is one that would require parties to all civil actions to be present at any hearing or proceeding, in person or by authorized representative other than legal counsel. No doubt further bills will be filed between now and the February 27 meeting, and I will bring copies thereof with me for distribution in case the Council wishes to discuss any of them.

Another item of new business is a February 1 letter to Henry from Helle Rode regarding ORCP 55 and having to do with subpoenas of hospital and other similar records, a copy of which is attached. As you know, John Hart is chairer of a task force that will be considering possible recommended rules changes regarding hospital records, a project which could not be completed during this biennium.

As much as I dislike having to conclude on a somewhat disagreeable note, I must warn you the Council has somewhat overspent its current biennial budget for reasons I shall explain at the February 27 meeting should anyone wish to know. It is therefore possible that there will be insufficient funds with which to reimburse you for travel expenses in connection with that meeting. Needless to say, Gilma and I will do whatever we can to patch up some arrangement whereby you can receive the expense reimbursement to which you are surely entitled.

Enc.

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March 9, 1993

Honorable Dick Springer
Chairman, Senate Judiciary Committee
S-223 State Capitol
Salem, OR 97310

Re: Senate Bill 215

Dear Senator Springer:

This letter follows Henry Kantor's correspondence to you dated February 23, 1993. Mr. Kantor asked that your committee not take action on Senate Bill 215 until the Council on Court Procedures had met and discussed the matter because of the apparent conflict between SB 215 and the Council's proposed amendments to ORCP 39, which become law next year unless amended (assuming House Bill 2360 does not become law!)

I am the chair of the Oregon State Bar Procedure and Practice Committee. I was the original author of Senate Bill 215 several years ago as a member of the Procedure and Practice Committee. As I explained to Henry Kantor recently, the proposal went to Legislative Council and was drafted as Senate Bill 215 before I and my committee knew of the Council's proposed amendments to ORCP 39, which were published December 12, 1992.

Upon comparison, I believe the Council's proposed amendments are preferable to the changes invoked in SB 215. Accordingly, I would urge you to allow SB 215 to die in committee and to support CCP's amendments to ORCP 39.

If you have any questions about this matter, please do not hesitate to contact me. I would be happy to provide any input I can.

Very truly yours,

BRICKER, ZAKOVICS & QUERIN, P.C.

Stephen C. Thompson

SCT:ghp
Enclosure

cc: Henry Kantor
John E. Hart
Susan Evans Grabe
Bob Oleson
A. Carl Myers
OSB Public Affairs

Copy to H.K

OREGON STATE BAR
1935

5200 S.W. Meadows Road, P.O. Box 1689, Lake Oswego, Oregon 97035-0889
(503) 620-0222 or WATS 1-800-452-8260, FAX: (503) 684-1366

Henry,
Technically, a bill can be withdrawn. Bill agrees not to schedule the 2 bills.
Susan

January 22, 1993

William E. Taylor, Jr.
Room 140, State Capitol
Salem, OR 97310

Dear Bill:

I am writing to request that, because they will be included in the Council on Court Procedures final report to the legislature on recommended changes to the Oregon Rules on Civil Procedure, the following bills be withdrawn:

SB 253: regarding notice to defendant in summons to contain bar lawyer referral number

SB 215: amending the rules of civil procedure to provide that parties may stipulate to telephone depositions

Thank you for your attention to this matter and also for the courtesy the Senate Judiciary has extended to the state bar.

Sincerely yours,

Susan Evans Grabe
Law Improvement Coordinator

SEG:jc

Senate Bill 215

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Interim Judiciary Committee for Procedure and Practice Committee of Oregon State Bar)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Allows parties in civil proceedings to stipulate to deposition by telephone.

A BILL FOR AN ACT

Relating to depositions; amending ORCP 39 C.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 39 C. is amended to read:

C. Notice of examination.

C.(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

C.(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

C.(3) Shorter or longer time. The court may for cause shown enlarge or shorten the time for taking the deposition.

C.(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

C.(6) Deposition of organization. A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

C.(7) Deposition by telephone. **Parties may agree by stipulation, or** the court may upon motion order that testimony at a deposition be taken by telephone, in which event the **stipulation or** 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. **A stipulation between the parties must be made part of the record by the person authorized to administer oaths for the purpose of the deposition under the provisions of ORCP 38. A party who enters into a stipulation under this subsection waives any objection that the party may have to telephonic transmission of the testimony.**

Senate Bill 253

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Interim Judiciary Committee for Lawyer Referral Committee of Oregon State Bar)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Requires that notice to defendant in summons contain phone number for Oregon State Bar Lawyer Referral and Information Service.

A BILL FOR AN ACT

Relating to summonses; creating new provisions; and amending ORCP 7 C.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 7C. is amended to read:

C.(1) Contents. The summons shall contain:

C.(1)(a) Title. The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(1)(b) Direction to defendant. A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and a notification to defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(1)(c) Subscription; post office address. A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(2) Time for response. If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D.(6) of this rule, the defendant shall appear and defend within 30 days from the date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C.(3) Notice to party served.

C.(3)(a) In general. All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. **If you do not have an attorney, you may wish to call the Oregon State Bar Lawyer Referral and Information Service at 684-3763 (Portland Area) or 1-800-452-7635 (Outside Portland Area).**

C.(3)(b) Service for counterclaim. A summons to join a party to respond to a counterclaim pursuant to Rule 22 D. (1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. **If you do not have an attorney, you may wish to call the Oregon State Bar Lawyer Referral and Information Service at 684-3763 (Portland Area) or 1-800-452-7635 (Outside Portland Area).**

C.(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. **If you do not have an attorney, you may wish to call the Oregon State Bar Lawyer Referral and Information Service at 684-3763 (Portland Area) or 1-800-452-7635 (Outside Portland Area).**

SECTION 2. The amendments to ORCP 7C. by section 1 of this Act apply only to summonses served on or after the effective date of this Act.

Senate Bill 340

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Trial Lawyers Association)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Allows disclosure of materials or information produced during discovery related to personal injury action or action for wrongful death even though protective order has been entered if disclosure is to another attorney representing client in similar or related matter. Requires notice to parties protected by order and opportunity to be heard. Requires court to allow disclosure except for good cause shown. Allows parties to stipulated protective order to agree that disclosure not be made. Applies only to protective orders issued on or after effective date of Act.

A BILL FOR AN ACT

Relating to discovery; creating new provisions; and amending ORCP 36 C.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 36 C. is amended to read:

C. Court order limiting extent of disclosure.

C.(1) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

C.(2) A protective order issued under subsection (1) of this section to prevent disclosure of materials or other information related to a personal injury action or action for wrongful death shall not prevent an attorney from voluntarily sharing materials or information subject to the order with an attorney representing a party to a proceeding involving a similar or related matter. Disclosure may only be made by order of the court, after notice and an opportunity to be heard is afforded to the parties or persons for whose benefit the protective order has been issued. Disclosure shall be allowed by the court except for good cause shown

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

by the parties or persons for whose benefit the protective order has been issued. No order may be issued allowing disclosure unless the attorney receiving the material or information agrees in writing to be bound by the terms of the protective order and the court makes a written determination that there is good cause to believe that the protective order will be obeyed. The provisions of this subsection apply to protective orders in all cases, and are not limited to protective orders in actions for personal injury or wrongful death.

C.(3) If the parties to a proceeding stipulate in writing to a protective order under subsection (1) of this section, the parties may by the terms of the stipulation agree that disclosure of the materials or other information may not be made under the provisions of subsection (2) of this section. If the parties so agree, the court shall not enter an order allowing disclosure under the provisions of subsection (2) of this section.

SECTION 2. The amendments to ORCP 36 C. by section 1 of this Act shall apply only to protective orders issued on or after the effective date of this Act.

House Bill 2360

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of Representative Kevin Mannix)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Requires that Oregon Rules of Civil Procedure may only be enacted, amended, repealed or supplemented by law enacted by Legislative Assembly. Deletes provisions that allow rule promulgated by Council on Court Procedures to become effective unless Legislative Assembly repeals or modifies promulgated rule. Specifies that rules submitted to Sixty-seventh Legislative Assembly by Council on Court Procedures are not effective unless enacted by law.

A BILL FOR AN ACT

Relating to Oregon Rules of Civil Procedure; creating new provisions; amending ORS 1.730, 1.735, 1.750, 174.580 and 174.590 and ORCP 1 D.; and repealing ORS 1.745.

Be It Enacted by the People of the State of Oregon:

SECTION 1. The Oregon Rules of Civil Procedure may only be enacted, amended, repealed or supplemented by law enacted by the Legislative Assembly.

SECTION 2. ORS 1.730 is amended to read:

1.730. (1) There is created a Council on Court Procedures consisting of:

(a) One judge of the Supreme Court, chosen by the Supreme Court;

(b) One judge of the Court of Appeals, chosen by the Court of Appeals;

(c) Six judges of the circuit court, chosen by the Executive Committee of the Circuit Judges Association;

(d) Two judges of the district court, chosen by the Executive Committee of the District Judges Association;

(e) Twelve members of the Oregon State Bar, at least two of whom shall be from each of the congressional districts of the state, appointed by the Board of Governors of the Oregon State Bar. The Board of Governors, in making the appointments referred to in this section, shall include but not be limited to appointments from members of the bar active in civil trial practice, to the end that the lawyer members of the council shall be broadly representative of the trial bar. The Board of Governors shall include at least one person who by profession is involved in legal teaching or research; and

(f) One public member, chosen by the Supreme Court.

(2)(a) A quorum of the council shall be constituted by a majority of the members of the council. An affirmative vote of a majority of the council shall be required to [*promulgate*] **propose** rules [*pursuant to ORS 1.735*].

(b) The council shall [*adopt*] **propose** rules of procedure and shall choose, from among its membership, annually, a chairman to preside over the meetings of the council.

(3)(a) All meetings of the council shall be held in compliance with the provisions of ORS 192.610 to 192.690.

(b) In addition to the requirements imposed by paragraph (a) of this subsection, with respect to

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

the public hearings required by ORS 1.740 and with respect to any meeting at which final action will be taken on the [*promulgation,*] **proposal for enactment,** modification or repeal of a rule [*under ORS 1.735*], the council shall cause to be published or distributed to all members of the bar, at least two weeks before such hearing or meeting, a notice which shall include the time and place and a description of the substance of the agenda of the hearing or meeting.

(c) The council shall make available upon request a copy of any rule which it proposes [*to promulgate, modify or repeal*] **for enactment, modification or repeal.**

(4) Members of the Council on Court Procedures shall serve for terms of four years and shall be eligible for reappointment to one additional term, provided that, where an appointing authority has more than one vacancy to fill, the length of the initial term shall be fixed at either two or four years by that authority to accomplish staggered expiration dates of the terms to be filled. Vacancies occurring shall be filled by the appointing authority for the unexpired term.

(5) Members of the Council on Court Procedures shall not receive compensation for their services but may receive actual and necessary travel or other expenses incurred in the performance of their official duties as members of the council, as provided in ORS 292.210 to 292.288.

SECTION 3. ORS 1.735 is amended to read:

1.735. The Council on Court Procedures shall [*promulgate*] **propose** rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The [*rules thus adopted*] **proposed rules** and any amendments which may be [*adopted*] **proposed** from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session [*and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier effective date*]. [*The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.*]

SECTION 4. ORS 1.750 is amended to read:

1.750. The Legislative Counsel shall cause the rules which [*have become effective under ORS 1.735, as they may be*] **are enacted,** amended, repealed or supplemented by the Legislative Assembly, to be arranged, indexed, printed, published and annotated in the Oregon Revised Statutes.

SECTION 5. ORS 174.580 is amended to read:

174.580. (1) [*As used in the statute laws of this state, including provisions of law deemed to be rules of court as provided in ORS 1.745, "Oregon Rules of Civil Procedure" means the rules adopted, amended or supplemented as provided in ORS 1.735.*] **As used in the statute laws of this state, "Oregon Rules of Civil Procedure" means those enactments of the legislature that are arranged, indexed, printed, published and annotated by the Legislative Counsel under the provisions of ORS 1.750.**

(2) In citing a specific rule of the Oregon Rules of Civil Procedure, the designation "ORCP (number of rule)" may be used. For example, Rule 7, section D., subsection (3), paragraph (a), subparagraph (i), may be cited as ORCP 7 D.(3)(a)(i).

SECTION 6. ORS 174.590 is amended to read:

174.590. References in the statute laws of this state[, *including provisions of law deemed to be rules of court as provided in ORS 1.745,*], **including references in the Oregon Rules of Civil Procedure,** in effect on or after January 1, 1980, to actions, actions at law, proceedings at law, suits, suits in equity, proceedings in equity, judgments or decrees are not intended and shall not be

construed to retain procedural distinctions between actions at law and suits in equity abolished by ORCP 2.

SECTION 7. ORCP 1 D. is amended to read:

D. "Rule" defined and local rules. References to "these rules" shall include Oregon Rules of Civil Procedure numbered 1 through 85. General references to "rule" or "rules" shall mean only rule or rules of pleading, practice and procedure [*established by ORS 1.745,*] **enacted by the Legislative Assembly and arranged, indexed, printed, published and annotated by the Legislative Counsel under the provisions of ORS 1.750** or promulgated under ORS 1.006, [*1.735,*] 2.130 and 305.425, unless otherwise defined or limited. These rules do not preclude a court in which they apply from regulating pleading, practice and procedure in any manner not inconsistent with these rules.

SECTION 8. (1) The Oregon Rules of Civil Procedure in effect on the effective date of this Act are not affected by this Act.

(2) Any rules or amendments submitted to the Sixty-seventh Legislative Assembly by the Council on Court Procedures under the provisions of ORS 1.735 (1991 Edition) do not become effective unless those rules or amendments are enacted by the Sixty-seventh Legislative Assembly.

SECTION 9. ORS 1.745 is repealed.

YES

House Bill 2497

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of Interim Committee on Agency Reorganization and Reform)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Reduces number of jurors in circuit court civil cases from 12 to six.

A BILL FOR AN ACT

Relating to circuit court juries; creating new provisions; and amending ORCP 56 and 59 G.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 56 is amended to read:

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*] **six** or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

SECTION 2. ORCP 59 G. is amended to read:

G. Return of jury verdict.

G.(1) Declaration of verdict. When the jurors have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. The court shall inquire whether they have agreed upon their verdict. If the foreperson answers in the affirmative, it shall be read.

G.(2) Number of jurors concurring. [*In civil cases three-fourths of the jury may render a verdict.*]

G.(2)(a) If the jury consists of six persons, five jurors must agree on a verdict, unless the parties have stipulated to some other number under ORCP 56;

G.(2)(b) If the jury consists of five persons, four jurors must agree on a verdict;

G.(2)(c) If the jury consists of four persons, three jurors must agree on a verdict;

G.(2)(d) If the jury consists of three persons, two persons must agree on a verdict; and

G.(2)(e) If the jury consists of two or less persons, the verdict must be unanimous.

G.(3) Polling the jury. When the verdict is given, and before it is filed, the jury may be polled on the request of a party, for which purpose each juror shall be asked whether it is his or her verdict. If a less number of jurors answer in the affirmative than the number required to render a verdict, the jury shall be sent out for further deliberations.

G.(4) Informal or insufficient verdict. If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be required to deliberate further.

G.(5) Completion of verdict; form and entry. When a verdict is given and is such as the court may receive, the clerk shall file the verdict. Then the jury shall be discharged from the case.

SECTION 3. The amendments to ORCP 56 and ORCP 59 G. by sections 1 and 2 of this Act apply only to actions commenced on or after the effective date of this Act.

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

House Bill 2562

Introduced and printed pursuant to House Rule 13.01 (at the request of Oregon Association of Process Servers, Oregon State Sheriffs Association)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Prohibits service of summons by person other than sheriff, sheriff's deputy or employee of attorney licensed to practice law unless person has on file with Secretary of State $100,000 certificate of errors and omissions insurance.

A BILL FOR AN ACT

Relating to service of summons.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) Notwithstanding ORCP 7 E., a person may not serve a summons for a fee unless the person has on file with the Secretary of State a current certificate of errors and omissions insurance with limits of not less than $100,000 per occurrence from a company authorized to do business in this state.

(2) Failure of a person to comply with subsection (1) of this section does not affect the validity of a service of summons made by the person that is otherwise in compliance with the law.

(3) Subsection (1) of this section does not apply to a sheriff, a sheriff's deputy or the employee of an attorney who has been admitted to the practice of law in this state.

SECTION 2. Section 1 of this Act applies only to a service of summons made on or after the effective date of this Act.

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

LC 1661

House Bill 5045

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of Budget and Management Division, Executive Department)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Appropriates money from General Fund to Council on Court Procedures for biennial expenses. Declares emergency, effective July 1, 1993.

A BILL FOR AN ACT

Relating to the financial administration of the Council on Court Procedures; appropriating money; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. There is appropriated to the Council on Court Procedures, for the biennium beginning July 1, 1993, out of the General Fund, the amount of $99,709.

SECTION 2. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect July 1, 1993.

Note: For budget, see 1993-95 Biennial Budget, Page K-3

NOTE: Matter in boldfaced type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in boldfaced type.

LC 9045

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** RESIDENT, BEND OFFICE

February 1, 1993

Mr. Henry Kantor
KANTOR & SACKS
1100 Standard Plaza
1100 S.W. Sixth Avenue
Portland, OR 97204

Re: Council on Court Procedures: Revisions to ORCP 55

Dear Mr. Kantor:

I am writing with regard to ORCP 55 which relates to subpoenas for records. I have three changes to suggest. First, that subpoenas for books, papers, or documents, not accompanied by a demand to appear at trial or hearing, or at deposition, be allowed to be served by regular mail (i.e., revise ORCP 55D(3)(d)). Realistically, most such subpoenas are served by regular mail because this is the most efficient process. Otherwise, in a case requiring several subpoenas, the service fees can become astronomical. This is especially true if the person with the documents is out of town. It is also consistent with ORCP 55H(2)(d), which allows the service of subpoenas to hospitals by first-class mail.

Second, the time periods for giving notice to the injured party of the subpoena and for actually requiring production of the documents, should be the same for non-hospital records as for hospital records. I suggest 10 days' notice to the parties and 10 days for the responding party to produce the documents (unless the responding party is subpoenaed to court with the documents, in which case the subpoena should simply be served before the person is required to appear). Please compare the last two sentences of Section D(1), with the last sentence of Section H (2)(b) and the second to the last sentence in Section H (2)(a).

I think ten days' notice to the other party is sufficient because if the notice is mailed, it must be mailed 13 days before the subpoena is served. Thus, unless the mail is particularly slow, the other party will generally have 11 to 12 days' notice of the subpoena in any case. This should be plenty of time to file an objection.

Third, it should be made clear that certain sections of ORCP 55 do not apply to Section H, which deals with hospital records. For example, Section D does not apply. This would at least eliminate some confusion.

If you have any questions in this regard, please feel free to call me.

Very truly yours,

Helle Rode

HR:mlw
[HR\DCA9-9.W40]

and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. Compromise; Effect of Acceptance or Rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

[Amended effective January 1, 1982; January 1, 1984; January 1, 1986.]

RULE 55. SUBPOENA S

A. Defined; Form. A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For Production of Books, Papers, Documents, or Tangible Things and to Permit Inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents or

tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things but not commanded to also appear for deposition, hearing or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents or tangible things the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance.

C(1) *By Whom Issued.* A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce books, papers, documents or tangible things and to permit inspection thereof: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38C, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

C(2) *By Clerk in Blank.* Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

D. Service; Service on Law Enforcement Agency; Service by Mail; Proof of Service.

D(1) *Service.* Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39C(6), shall be served in the same manner as provided for service of summons in Rule 7D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

D(2) *Service on Law Enforcement Agency.*

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

D(3) *Service by Mail.* Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D(3)(b) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(c) The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

D(3)(d) Service of subpoena by mail may not be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

D(4) *Proof of Service.* Proof of service of a subpoena is made in the same manner as proof of service of a summons.

E. Subpoena for Hearing or Trial; Prisoners. If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for Taking Depositions or Requiring Production of Books, Papers, Documents, or Tangible Things; Place of Production and Examination.

F(1) *Subpoena for Taking Deposition.* Proof of service of a notice to take a deposition as provided in Rules 39C and 40A, or of notice of subpoena to command production of books, papers, documents, or tangible things before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein.

F(2) *Place of Examination.* A resident of this state who is not a party to the action may be required by subpoena to attend an examina-

tion or to produce books, papers, documents, or tangible things only in the county wherein such person resides, is employed or transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend or to produce books, papers, documents or tangible things only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

G. Disobedience of Subpoena; Refusal to Be Sworn or Answer as a Witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, such party's complaint, answer, or reply may be stricken.

H. Hospital Records.

H(1) *Hospital.* As used in this section, unless the context requires otherwise, "hospital" means a health care facility defined in ORS 442.015(13)(a) through (d) and licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.700.

H(2) *Mode of Compliance.* Hospital records may be obtained by subpoena duces tecum 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.

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule.

H(3) *Affidavit of Custodian of Records.*

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) *Personal Attendance of Custodian of Records May Be Required.*

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

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

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) *Tender and Payment of Fees.* Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

[Amended effective January 1, 1982; January 1, 1984; January 1, 1988; October 3, 1989; January 1, 1990; January 1, 1992.]

RULE 56. TRIAL BY JURY

Trial by Jury Defined. A trial jury in the circuit court is a body of 12 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.

RULE 57. JURORS

A. Challenging Compliance With Selection Procedures.

A(1) *Motion.* Within 7 days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief, on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury.

A(2) *Stay of Proceedings.* Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury, the moving party is entitled to present in support of the motion: the testimony of the clerk or court administrator, any relevant records and papers not public or otherwise available used by the clerk or court administrator, and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply with the applicable