COUNCIL ON COURT PROCEDURES

Saturday, December 10, 1988 Meeting
9:30 a.m.

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

A G E N D A

1. Public comment
2. Approval of minutes of meeting of November 12, 1988
3. Selection of new Council Chairer
4. Formal promulgation of rules for 1987-1989 biennium
5. Amendment of ORCP 44 C (Thorp/Pratt proposal)
6. Amendment of ORCP 44 relating to ex parte contact between defense attorney and plaintiff's treating physician (report of Executive Director)
7. **NEW BUSINESS**

* * * * *

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of December 10, 1988

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

Present:	Richard L. Barron	R.L. Marceau
	John H. Buttler	Jack L. Mattison
	L.G. Harter	Douglas Newell
	Lee Johnson	Richard P. Noble
	Bernard Jolles	James E. Redman
	Henry Kantor	Martha Rodman
	John V. Kelly	J. Michael Starr
	Winfrid Liepe	Laurence Thorp
	Paul J. Lipscomb	Elizabeth Yeats
	R.B. McConville	
Absent:	Steven H. Pratt	
	Wm. F. Schroeder	
	George A. Van Hoomissen	

Kathryn Augustson, representing the OSB Procedure and Practice Committee, was also present.

(Also present were Fredric R. Merrill, Executive Director, and Gilma J. Henthorne, Management Assistant.)

The meeting was called to order by Vice Chairer Ron Marceau at 9:30 a.m.

Steve Pratt submitted a letter containing his comments regarding proposals and his suggestion for an amendment to 55 H. Win Calkins also submitted a letter commenting upon proposals to amend the procedure for access to hospital records. Copies of these letters were distributed at the meeting, and a copy of each is being made a part of the original of these minutes.

It was announced that George Van Hoomissen, Douglas Newell, and Bernard Jolles had been appointed to fill the unexpired terms of Robert E. Jones, Judith Miller, and the late Raymond Conboy, respectively.

Agenda Item No. 1: Public comment. No public comment was received at this point, but Kathryn Augustson, representing the OSB Procedure and Practice Committee, later commented regarding the amendments to ORCP 69.

Agenda Item No. 2: Approval of minutes of meeting of November 12, 1988. Upon motion of Larry Thorp, seconded by judge McConville, the minutes of the meeting held November 12, 1988 were unanimously approved.

Agenda Item No. 3: Selection of new Council Chairer. Vice Chairer Ron Marceau was nominated to be Chairer, and Henry Kantor was nominated to be Vice Chairer. Both were elected by unanimous vote.

Agenda Item No. 4: Formal promulgation of rules for 1987-1989 biennium. Pursuant to notice published in the Bar Bulletin, the Council took the following actions concerning the document entitled TENTATIVE DRAFT dated October 15, 1988, attached to the original of these minutes. Each tentatively adopted rule was presented by the chairer for formal promulgation or amendment. The chairer stated that affirmative votes of 12 Council members were needed to promulgate a rule.

Rule 4 (JURISDICTION). The tentatively adopted amendment to ORCP 4 E was unanimously promulgated.

Rule 7 (SUMMONS). Judge Buttler suggested that the words "to the defendant" be deleted in the third line of D(2)(d). Judge Buttler also raised the question of whether it was necessary to serve the defendant, the Department of Motor Vehicles, and the insurer before an action was deemed to be commenced and whether it actually was necessary to serve the insurer to satisfy the statute of limitations.

After discussion, Judge Liepe, with a second by Larry Thorp, moved to amend the tentatively adopted change to ORCP 7 D(4)(a)(i) by substituting the words "by registered or certified mail, return receipt requested" for the words "in accordance with paragraph 7 D(2)(d) of this rule". The motion passed 16-2, with one abstention. Judge Liepe moved to make an identical change to the language in ORCP 7 D(4)(a)(ii) and to add the word "to" between the word "and" and the words "the defendant's insurance carrier" in the fourth line from the end of that subparagraph. The motion was again seconded by Larry Thorp. The motion passed 18 to 1.

Judge Butler then moved to have the last sentence of subparagraph 7 D(4)(a)(ii) read: "For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon [such] <u>the</u> mailing [.] <u>of the copies of the copies of the summons and complaint as described in this subparagraph.</u> The motion failed 14 to 5.

The Council then unanimously adopted the amendment to ORCP 7 D(4)(a) as modified.

It was the consensus of the Council that further work was required to clarify problems and ambiguities in Rule 7. Judge Buttler, Judge Johnson, and Mike Starr were appointed to a special subcommittee to work on the matter for submission during the next biennium.

RULE 10 (TIME). After discussion of a proposed change by Judge Liepe (which he later withdrew) and further discussion, Judge Butler moved, seconded by Bernard Jolles, for an additional change to Rule 10 so that the second to the last sentence would read:

> "When the period of time prescribed or allowed (without regard to section C of this rule) is less than seven days, intermediate Saturdays[, Sundays,] and legal holidays, including Sundays, shall be excluded in the computation."

The Chairer called for a vote to approve the amendment to Rule 10 proposed above, and 15 voted in favor, one was opposed, and 3 abstained from voting. The Chairer then called for a vote to approve for promulgation the amendments to Rule 10 (as further amended), and 17 voted in favor, one voted in opposition, and one abstained.

RULE 44 (PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS). Final action was deferred until a further meeting of the Council was held.

RULE 59 (INSTRUCTIONS TO JURY AND DELIBERATION). Judge Johnson made a motion, seconded by Judge McConville, to strike the language "for any noon or evening recess" from the draft. The motion passed with 17 in favor and 2 opposed. The Chairer called for a vote to approve for promulgation the amendment to Rule 59 (with the foregoing language deleted), and 17 voted in favor and 2 were opposed.

RULE 68 (ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS). Judge Johnson suggested that ORCP 68 ought to be modified so that the pleading requirements did not apply to attorney fees awarded pursuant to ORS 20.105. After discussion, the Council unanimously promulgated the amendment to ORS 68 which had been tentatively adopted and decided to consider the application of ORCP 68 to attorney fees under ORS 20.105 during the next biennium.

RULE 69 (DEFAULT ORDERS AND JUDGMENTS). Larry Thorp stated that he thought the proposed amendments to 69 A and B presented another hurdle in obtaining a judgment. Kathy Augustson, speaking on behalf of the OSB Procedure & Practice Committee, pointed out that there is no longer any requirement that notice be given prior to an evidentiary hearing.

Chairer Ron Marceau called for a vote to approve for promulgation the proposed amendments to Rule 69 A and B, and 15 voted in favor, 2 were opposed, and 2 abstained.

RULE 70 (FORM AND ENTRY OF JUDGMENT). Judge Liepe first pointed out a typographical error in the tentative draft of 70 A.(2)(f)(e): "interest is simple [of] and if ...". After discussion, a motion was made by Judge Liepe, seconded by Judge McConville, to table consideration of amendments to Rule 70. After further discussion, the motion passed with 11 in favor and 8 opposed. It was pointed out that the Judgments Subcommittee, consisting of Judge Mattison, Judge McConville, and Martha Rodman, would be meeting before the first of the year to review the proposal of the Judgments Committee of the State Court Administrator's Office and that the results of their study would be presented to the Council at a January meeting of the Council.

RULE 71 (RELIEF FROM JUDGMENT OR ORDER). A suggestion was made by Judge Liepe to change "as provided in 71 B(2)" in the last sentence of 71 A to "as provided in subsection B(2)". The Chairer called for a vote to approve for promulgation the amendments to Rule 71, as modified by judge Liepe°s suggestion, and for approval of the previously accepted proposal for statutory amendment of ORS 19.033. Eighteen Council members voted in favor with one opposed.

RULE 80 (RECEIVERS). After discussion, the Chairer called for a vote to approve for promulgation the amendments to Rule 70, and there was a unanimous vote in favor of promulgation. The Executive Director stated that he would try to shorten the comment.

Agenda Item No. 5: Amendment of ORCP 44 and 55 (Thorp/Pratt proposal). Copies of Larry Thorp's proposed amendments to Rules 44 and 55 had been distributed to members of the Council.

The Council considered the Thorp proposal to amend Rule 44 E set out below:

> "**E. Access to hospital records.** Any party against whom a civil action is filed for compensation or damages for injuries may [examine and make] obtain copies of all records of any hospital in reference to and connection with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under [Rule] Section 36 B. [Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.] Hospital records shall be obtained by subpoena in accordance with Section 55

H."

The Council considered the Thorp proposal to amend 55 H set out below:

"Hospital records.

* * * *

H.(2) Mode of compliance [with subpoena of hospital records]. If disclosure of hospital records is restricted by law, such records may only be disclosed in accordance with such law. In all other cases hospital records may be obtained by subpoena duces tecum as provided in this section.

* * * *

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 fore the taking of the deposition or at the officer's place of business; (iii) in other cases, [to the officer or body conducting the hearing at the official place of business] if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records to the attorney or party requesting the records, then a copy of the subpoena shall be served on the injured party not less than ten days prior to service of the subpoena on the hospital.

Judge lipscomb suggested a change in the last sentence of Thorp's proposed change to 55 H(2)(b)(iii) so that it would read as follows:

"(iii) in other cases, 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 ten days prior to service of the subpoena on the hospital."

Steve Pratt in his letter had suggested adding the following subsection to 55 H:

"H.(2)(c) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by certified mail, return receipt requested. Proof of service of a subpoena under this section is made in the same manner as proof of service of a summons."

After further discussion, Larry Thorp made a motion that his proposals to amend Rules 44 and 55, with the changes suggested by Judge Lipscomb and Steve Pratt, be tentatively adopted. The motion passed with 15 in favor, one opposed, and three abstentions.

The Chairer pointed out that final action on Rules 44 and 55 would be taken at a January meeting of the Council.

Agenda Item No. 6: Amendment of ORCP 44 relating to ex parte contact between defense attorney and plaintiff's treating physician (report of Executive Director). The Executive Director's memorandum of November 23, 1988 containing a proposed amendment to 44 C was considered by the Council. After extensive discussion and a number of changes suggested by Dick Noble, the Council considered the following proposed form of revision of ORCP 44:

C. [Reports of examinations: c] <u>C</u>laims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or legal control of a party[,]<u>:</u>

<u>C(1) Reports of examinations.</u> <u>U</u>pon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports [or] <u>and</u> existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

C.(2) Contact with treating doctors. If there has been a waiver of the physician-patient privilege by the claimant for any physician who has provided treatment to the plaintiff, the attorney for the party against whom the claim is pending shall not contact physicians who have provided treatment to the claimant concerning the claim without 10 days prior written notice to the claimant or the attorney for the claimant. During the pendency of the action, no contact concerning the claim shall take place between any physician who has provided treatment to the claimant and the attorney for the party against whom the claim is pending, unless the claimant or the attorney for the claimant is given a reasonable opportunity to be present.

After a lengthy discussion, a Dick Noble moved to

tentatively adopt the proposal. The motion was seconded by Bernard Jolles. The motion failed 10 to 9.

The Chairer asked whether the Council wanted to have a special meeting to consider the Thorp and Pratt proposals and to promulgate the amendment of Rule 44 C changing "and" to "or".

The Council discussed the possibility of having the meeting via telephone conference call. The Executive Director stated that he would contact the Attorney General's Office regarding requirements relating to the public meetings law and that he would do what was necessary to give adequate notice to the Bar and public.

The Chairer called for a vote as to whether the Council members were in agreement that a special meeting should be arranged for the purposes specified above, and 17 voted in favor, one was opposed, and one abstained. It was decided that the date of the special meeting would be January 6, 1989.

Agenda Item No. 7: NEW BUSINESS. It was agreed that a special "Errors and Omissions Committee" be appointed to review the draft of promulgated amendments prior to submission of the final package to the legislature. Ron Marceau, Henry Kantor, and Elizabeth Yeats were appointed to that committee.

The meeting adjourned at 12:45 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

November 23, 1988

TO: Members, COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill, Executive Director

Enclosed are the minutes of the meeting of November 12, 1988, an agenda for the meeting of December 10, 1988, and a copy of the current form of all amendments tentatively adopted by the Council to date.

ATTENDANCE AT THE DECEMBER 10 MEETING IS OF UTMOST IMPORTANCE. ALL ACTIONS ON THE RULES BY THE COUNCIL TO THIS DATE HAVE BEEN TENTATIVE. BY STATUTE, FORMAL PROMULGATION OF NEW RULES AND AMENDMENTS MAY ONLY BE DONE WITH AN AFFIRMATIVE VOTE OF 12 MEMBERS OF THE COUNCIL. ANY PROMULGATION OF RULES OR AMENDMENTS BY THE COUNCIL MUST BE DONE AT THIS MEETING. PROMULGATED RULES MUST BE SUBMITTED TO THE LEGISLATURE AT THE BEGINNING OF THE SESSION.

I was asked to submit a proposal for an amendment to ORCP 44 that would limit ex parte contacts between defense attorneys and plaintiff's treating physicians.

ORCP 44

C. [Reports of examinations; c] Claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or legal control of a party[,]:

C. Reports of examinations. Upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports [or] and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

C(2) Contact with treating physicians. If there is a waiver of the physician-patient privilege by the claimant for any physicians providing treatment to the plaintiff during the pendency of the action, the attorney for the party against whom the claim is pending shall not contact physicians providing treatment to the claimant without ten days prior written notice to the claimant or the attorney for the claimant. During the pendency of the action, no personal contact, including contact by telephone, shall take place between any physician providing treatment to the

claimant and the attorney for the party against whom the claim is pending, unless the claimant or the attorney for the claimant is given a reasonable opportunity to be present.

I am enclosing a copy of a Washington case which Ron Marceau found which deals with the problem involved.

Actual promulgation of this amendment, and of the amendment to ORCP 44 E which is being submitted by Larry Thorp and Steve Pratt, cannot be made at the meeting of December 10, 1988 because the notice required by ORS 1.730(3)(b) and (c) has not been given. That statute requires that the Council publish or distribute notice to all members of the Bar before any meeting where rules are to be promulgated. The notice must include a description of the substance of the agenda. The notice must be given two weeks before the meeting. The Council is also required to furnish copies upon request (presumably as a result of the notice) of any rule which it intends to promulgate. This has been done for all amendments tentatively adopted to date.

The notice published, and the copies of proposed amendments which we furnished upon request, did not include amendments to Rule 44 to change the procedure for access to hospital records or limit to defendant's access to treating physicians.

If the Council wishes to promulgate these changes, it can schedule another meeting, probably during the first week in January, and promulgate these two changes at that time. There is no requirement that all changes be promulgated at the same meeting, but they must be done before the legislative session begins. ORS 1.735 says the rules promulgated by the Council must be submitted "at the beginning" of the legislative session in order to go into effect on the following January. We have always interpreted this as requiring that promulgated rules be delivered to the speaker of the House and president of the Senate before the Legislative Assembly convenes. We need some lead time for the notice, but the legislature apparently does not convene until the morning of January 9, 1989.

FRM:gh
Enclosures

patient privilege had been waived and authorizing ex parte communication with decedent's treating physicians. The Superior Court, King County, Stephen M. Reilly, J., held that privilege had been waived but that ex parte communications were not authorized. Defendants appealed. The Supreme Court, Callow, J., held that defense counsel may not engage in ex parte contacts with plaintiff's treating physicians.

Affirmed.

1. Witnesses ⇐211(2)

Physician-patient privilege prohibits a physician from being compelled to testify, without patient's consent, regarding information revealed and acquired for purpose of treatment. West's RCWA 5.60.060(4); CR 26(b)(1).

2. Witnesses ⇐219(5)

Patient may waive physician-patient privilege by putting his or her physical condition in issue; but waiver is not absolute and is limited to medical information relevant to litigation. West's RCWA 5.60.060(4); CR 26(b)(1).

3. Attorney and Client ⇐32(12)

Defense counsel may not engage in ex parte contacts with plaintiff's treating physicians after physician-patient privilege has been waived.

Lane, Powell, Moss & Miller by Reed P. Schifferman and Richelle Gerow Bassetti, Seattle, for petitioners Mhyre.

Williams, Kastner & Gibbs by Mary H. Spillane, Seattle, for petitioners Kenny.

Kargianis, Austin & Erickson by Bruce A. Wolf, Seattle, for respondent.

Patricia H. Wagner and Nancy E. Elliott, Seattle, on behalf of Washington Defense Trial Lawyers, amici curiae for petitioners.

Bryan P. Harnetiaux and Robert H. Whaley, Spokane, on behalf of Washington Trial Lawyers Ass'n, amici curiae for respondent.

CALLOW, Justice.

The issue presented is whether defense counsel in a personal injury action may communicate *ex parte* with the plaintiff's treating physicians when the 1376 plaintiff has waived the physician-patient privilege. We hold that defense counsel may not engage in *ex parte* contact, but is limited to the formal discovery methods provided by court rule.

This is a wrongful death action brought by Robert Loudon, individually and as personal representative of the estate of his son, David Loudon, involving malpractice claims against Drs. James Mhyre and Gerald Kenny. Drs. Mhyre and Kenny treated David for liver and kidney damage received in an automobile accident in Washington on December 14, 1985. Believing David's condition to be improving, the doctors released him from the hospital the following week. Upon return to his home in Oregon, however, David suffered complications and died on January 21, 1986.

Prior to his death, David received treatment from two Oregon health care providers. Loudon voluntarily provided Mhyre and Kenny with the medical records from those institutions. Defense counsel then moved for an order declaring that the physician-patient privilege had been waived and authorizing *ex parte* communication with David's treating physicians in Oregon.

Relying on *Kime v. Niemann*, 64 Wash. 2d 394, 391 P.2d 955 (1964), the trial court ruled that the privilege had been waived but that *ex parte* contact was prohibited. The court ordered that discovery could be had only through the procedures provided in the court rules. The defendants appealed. We granted discretionary review and we affirm the order of the trial court.

In *Kime*, this court set aside a pretrial order allowing *ex parte* contact, stating:

> We have not heretofore been advised of the need for an easier, less formal, and more economical means for securing information from doctors and hospitals concerning the injuries and "general physical condition" of plaintiffs in personal injury actions. If our discovery and pretrial procedures need revising or

liberalizing to give counsel greater latitude, we are willing to consider any suggestions the bar, or the trial courts may have.

[677] *Kime*, at 396, 391 P.2d 955.

The defendants now urge that there is a need for informal, *ex parte* interviews of treating physicians. They contend that depositions are more costly and less efficient; that requiring defendants, but not plaintiffs, to use formal discovery is unfair; and that requiring defendants to depose treating physicians gives plaintiffs a tactical advantage by enabling them to monitor the defendants' case preparation.

The jurisdictions which have addressed this issue are divided as to the appropriate answer. A number of courts have approved *ex parte* contact due to its advantages over depositions and the claimed unfair advantage given plaintiffs. *See Doe v. Eli Lilly & Co.*, 99 F.R.D. 126 (D.D.C. 1983); *Trans-World Inv. v. Drobny*, 554 P.2d 1148 (Alaska 1976); *Langdon v. Champion*, 745 P.2d 1371 (Alaska 1987); *Green v. Bloodsworth*, 501 A.2d 1257 (Del. Super.Ct.1985); *State ex rel. Stufflebam v. Appelquist*, 694 S.W.2d 882 (Mo.App.1985); *Stempler v. Speidell*, 100 N.J. 368, 495 A.2d 857 (1985). We decline to adopt the rule of these cases. We find that the burden placed on defendants by having to use formal discovery is outweighed by the problems inherent in *ex parte* contact. *See Alston v. Greater S.E. Comm'ty Hosp.*, 107 F.R.D. 35 (D.D.C.1985); *Petrillo v. Syntex Labs, Inc.*, 148 Ill.App.3d 581, 102 Ill.Dec. 172, 499 N.E.2d 952 (1986), *appeal denied*, 113 Ill.2d 584, 106 Ill.Dec. 55, 505 N.E.2d 361, *cert. denied sub nom. Tobin v. Petrillo*, — U.S. —, 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987); *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d 353 (Iowa 1986); *Wenninger v. Muesing*, 307 Minn. 405, 240 N.W.2d 333 (1976); *Smith v. Ashby*, 106 N.M. 358, 743 P.2d 114 (1987); *Nelson v. Lewis*, 130 N.H. 106, 534 A.2d 720 (1987); *Anker v. Brodnitz*, 98 Misc.2d 148, 413 N.Y.S.2d 582 (Sup.Ct.), *aff'd mem.*, 73 A.D.2d 589, 422 N.Y.S.2d 887 (App.Div.1979).

[1–3] We hold that *ex parte* interviews should be prohibited as a matter of public policy. The physician-patient privilege prohibits a physician from being compelled to testify, without the patient's consent, regarding information revealed and acquired for the purpose of treatment. RCW [678] 5.60.060(4).[1] A patient may waive this privilege by putting his or her physical condition in issue. *See Randa v. Bear*, 50 Wash.2d 415, 312 P.2d 640 (1957); *Phipps v. Sasser*, 74 Wash.2d 439, 445 P.2d 624 (1968).[2] Waiver is not absolute, however, but is limited to medical information relevant to the litigation. *See* CR 26(b)(1).

The danger of an *ex parte* interview is that it may result in disclosure of irrelevant, privileged medical information. The harm from disclosure of this confidential information cannot, as defendants argue, be fully remedied by subsequent court sanctions. The plaintiff's interest in avoiding such disclosure can best be protected by allowing plaintiff's counsel an opportunity to participate in physician interviews and raise appropriate objections. We find the reasoning of the Iowa Supreme Court persuasive:

> We do not mean to question the integrity of doctors and lawyers or to suggest that we must control discovery in order to assure their ethical conduct. We are concerned, however, with the difficulty of determining whether a particular piece of information is relevant to the claim being litigated. Placing the burden of

1. RCW 5.60.060(4) provides in part:

> Subject to the limitations under RCW 71.05.250, a physician or surgeon or osteopathic physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient ...

2. Under two recent amendments to the privilege, waiver is now required (*see* Laws of 1986, ch. 305, § 101, p. 1355) or is deemed to have occurred (*see* Laws of 1987, ch. 212, § 1501, p. 797) within 90 days of filing a personal injury or wrongful death action. These amendments do not apply here as Loudon filed this action before August 1, 1986. *See* Laws of 1986, ch. 305, § 910, p. 1367.

333 (1976); *Smith v.*
743 P.2d 114 (1987);
N.H. 106, 534 A.2d
Brodnitz, 98 Misc.2d
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Loudon filed this action
. *See* Laws of 1986, ch.

determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky. Asking the physician, untrained in the law, to assume this burden is a greater gamble and is unfair to the physician. We believe this determination is better made in a setting in which counsel for each party is present and the court is available to settle disputes.

[679] *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d at 357.

The defendants urge us to permit *ex parte* contact but allow plaintiff the opportunity to seek a protective order under CR 26(c) limiting or prohibiting such contact upon a showing of good cause. However, we foresee that a protective order would usually be sought by plaintiff's counsel which would involve the court system in supervision of every such situation. We reject such a procedure.

The mere threat that a physician might engage in private interviews with defense counsel would, for some, have a chilling effect on the physician-patient relationship and hinder further treatment. The relationship between physician and patient is "a fiduciary one of the highest degree ... involv[ing] every element of trust, confidence and good faith." *Lockett v. Goodill*, 71 Wash.2d 654, 656, 430 P.2d 589 (1967). This close confidential relationship is recognized by the Hippocratic Oath and in the ethical guidelines of the American Medical Association.[3] "[W]e find it difficult to believe that a physician can engage in an *ex parte* conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient." *Petrillo v. Syntex Labs., Inc.*, 148 Ill.App.3d at 595, 102 Ill.Dec. 172, 499 N.E. 2d 952. The presence of plaintiff's counsel as the protector of a [680] patient's confidences will allay the fear that irrelevant confidential material will be disclosed and preserve the fiduciary trust relationship between physician and patient. *Wenninger v. Muesing*, 307 Minn. at 411, 240 N.W.2d 333.

In addition, a physician has an interest in avoiding inadvertent wrongful disclosures during *ex parte* interviews. We recognize, without deciding, that a cause of action may lie against a physician for unauthorized disclosure of privileged information. *See Smith v. Driscoll*, 94 Wash. 441, 442, 162 P. 572 (1917) (dictum); Ward, *Pre-trial Waiver of the Physician/Patient Privilege*, 22 Gonz.L.Rev. 59, 62–63 (1986–87); Annot., *Physician's Tort Liability, Apart from Defamation, for Unauthorized Disclosure of Confidential Information about Patient*, 20 A.L.R.3d 1109 (1968). The participation of plaintiff's counsel to prevent improper questioning or inadvertent disclosures enhances the accomplishment of the purpose of the physician-patient privilege by also providing protection to the physician.

We note also that permitting *ex parte* interviews could result in disputes at trial should a doctor's testimony differ from the informal statements given to defense counsel, and may require defense counsel to testify as an impeachment witness.

We are unconvinced that any hardship caused the defendants by having to use formal discovery procedures outweighs the potential risks involved with *ex parte* interviews. Defendants may still reach the plaintiff's relevant medical records, and the cost and scheduling problems attendant with oral depositions can be minimized

3. Principle IV of the AMA Principles of Medical Ethics states:

> A physician shall respect the rights of patients ... and shall safeguard patient confidences within the constraints of the law.

Section 5.05 of the AMA Current Opinions of the Council on Ethical and Judicial Affairs (1986) further provides:

> The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.

See also Washington State Medical Association Judicial Council Opinion 5.06 (1985) (identical).

(though perhaps not as satisfactorily) by using depositions upon written questions pursuant to CR 31. Moreover, plaintiff's counsel may agree to an informal interview with both counsel present. Furthermore, the argument that depositions unfairly allow plaintiffs to determine defendants' trial strategy does not comport with a purpose behind the discovery rules—to prevent surprise at trial.

Finally, the defendants argue that prohibiting *ex parte* contact with physicians is inconsistent with *Wright* [681] *v. Group Health Hosp.*, 103 Wash.2d 192, 691 P.2d 564 (1984) and with the Washington State Bar Association Formal Ethics Opinion 180 (1985).[4] *Wright* held (1) that the attorney-client privilege would not, of itself, bar an opposing attorney from interviewing employees of a corporation so long as the inquiries concerned factual matters and not communications between the employee and the corporation's attorney; (2) current employees authorized to speak for a corporation would be considered "parties" with whom opposing counsel could not speak *ex parte;* and (3) opposing counsel could interview employees of the corporation *ex parte* so long as such employees were not authorized to speak for the corporation or in a management status.[5] *Wright v. Group Health Hosp., supra,* was not concerned with the fiduciary confidential relationship which exists between a physician and patient. The unique nature of the physician-patient relationship and the dangers which *ex parte* interviews pose justify the direct involvement of counsel in any contact between defense counsel and a plaintiff's physician. Similarly, Ethics Opinion 180 states only that *ex parte* contact with physicians is not unethical, but it does not address the policy concerns which militate against such contact.

[682] We hold that defense counsel may not engage in *ex parte* contacts with a plaintiff's physicians. The trial court's order is affirmed.

PEARSON, C.J., and DORE, UTTER, ANDERSEN, BRACHTENBACH, GOODLOE, DOLLIVER and DURHAM, JJ., concur.

Jerry ADKINS and Teresa Adkins, husband and wife, Appellants,

v.

ALUMINUM COMPANY OF AMERICA, a foreign corporation, Respondent.

No. 53309-1.

Supreme Court of Washington.

June 9, 1988.

Reconsideration Denied June 9, 1988.

ORDER CLARIFYING OPINION

PEARSON, Chief Judge.

IT IS HEREBY ORDERED that the opinion filed in *Adkins v. Aluminum Co. of Am.*, 110 Wash.2d 128, 750 P.2d 1257 (1988) on March 3, 1988 is clarified as follows:

At 110 Wash.2d, page 143 [second sentence, 4th paragraph, in the first column of page 1266, of 750 P.2d], the following second sentence in the first full paragraph is deleted:

We conclude that in this case the improper argument presumptively affected the

4. Washington State Bar Association Formal Ethics Opinion 180 reads:

> Where no patient privilege exists or where the privilege has been declared waived by Court Order or by the express written consent of the patient, a lawyer may interview a physician in the same manner as any other witness.

5. The *ex parte* communications rule of CPR DR 7-104 was replaced after the filing of the opinion in *Wright v. Group Health Hosp.* Its replacement, RPC 4.2, presently reads:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

F. WILLIAM LINDEN, JR.
State Court Administrator

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JUDICIAL DEPARTMENT

Supreme Court Building
Salem, Oregon 97310

November 28, 1988

Fredric R. Merrill
Executive Director
Council On Court Procedures
University of Oregon
School of Law
Eugene, OR 97403-1221

RE: Compelling Satisfaction of Judgments

Dear Professor Merrill:

Thank you for giving the Judgment Committee an opportunity to comment on the satisfaction of judgment procedure drafted by Judge Liepe and for providing a copy of the background materials you have gathered. The materials were extremely helpful. The Judgment Committee members are very pleased that the Council is addressing the satisfaction of judgment issue. Courts have been experiencing a variety of difficulties in this area for many years.

The Judgment Committee had several general comments about Judge Liepe's proposal. As you might expect, the Committee preferred its own proposed changes to ORS 18.410. Members liked many individual elements of the procedure but agreed that a shorter, more streamlined approach would be preferable. (For example, the thirty-day creditor response time seemed excessive to many members.)

The Committee felt that the largest drawback of the proposal, at least from a Judicial Department perspective, is that it does not cure the problem of people seeking to satisfy a judgment through the court clerk under ORS 18.410. A party could still demand that the court clerk enter a satisfaction of judgment under ORS 18.410, regardless of whether or not the ORCP 74 procedures were followed. As Judge Liepe pointed out, court clerks have been instructed not to calculate interest. In the Committee's opinion, it is essential that the mandatory language of ORS 18.410 that "...the clerk shall thereupon satisfy the judgment upon the records of the court..." be modified.

In the Committee's opinion, simplicity is the key to the success of a satisfaction of judgment procedure. Members were concerned that the numerous sanctions which are proposed by Judge Liepe's draft would result in increasing animosity between the parties and would tend to engender further litigation concerning the sanctions themselves, rather than aid in resolving the problem.

Finally, the Judgment Committee would like to offer just a general comment about the approach it would advocate. The Judgment Committee believes that a satisfaction of judgment procedure should be extremely limited in scope. Accord and satisfaction issues or other disputes involving the validity of the original judgment should not be handled by a satisfaction of judgment procedure. Therefore, in the Committee's opinion, it is essential to avoid creating a procedure where the parties would be allowed to dispute the validity of the original judgment or would be inclined to dispute any <u>new</u> issues (such as the imposition of sanctions).

The Judgment Committee agrees that court clerks should not be put into a position where they are required to decide what amount would properly satisfy a judgment. The parties or a judge should bear the ultimate responsibility for determining whether a judgment is, in fact, satisfied. To let a clerk do anything beyond merely certifying the amount actually paid into court would take that function out of the carefully circumscribed ministerial realm.

In conclusion, it appears that both the Judgment Committee and the Council on Court Procedures agree with the basic premise that establishing some form of satisfaction of judgment procedure would greatly help the courts as well as the parties.

I hope that the Judgment Committee's comments are helpful.

Sincerely,

Karen Hightower
Assistant Legal Counsel

KH:pk/E4P88006.F

cc: Linda Zuckerman
Members of the Judgment Committee

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November 29, 1988

Mr. Fredric Merrill
Executive Director
Council on Court Procedures
University of Oregon
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Eugene, Oregon 97403

Dear Fred:

I spoke with Steve Pratt last week. He told me that he would be out of town almost continuously until our meeting on December 10. As a result, he asked me to proceed to prepare proposals to amend ORCP 44E. and 55H. I also spoke with Ron Marceau, who felt that given the shortness of time, it would be more expedient for me to simply prepare the proposals myself. With that in mind, I have prepared the attached amendments and suggested staff comments.

In preparing these proposals, I bore in mind the concerns of the Council at our last meeting that attorneys not be required to schedule discovery depositions in order to obtain hospital records. I also kept in mind the concept that the party whose records are being produced should have an opportunity to object through obtaining a protective order. Finally, I tried to avoid the creation of any new discovery devices, since that would probably create as many problems as it would resolve.

In an effort to address the Council's concerns, I have provided an amendment to ORCP 44E. which simply provides that if the hospital records are sought in conjunction with a trial deposition or hearing, they will be produced in accordance with the procedures set out in 55H. In other cases, the injured party will be required to produce those records in response to a request for production. I noted, however, in the staff comment the suggestion that the injured party merely provide a release to the other party so it could obtain the records directly from the hospital and avoid the necessity of any further additional paperwork.

I have again revised ORCP 55H. in the same manner that I suggested in my letter of October 12. I have also, however, prepared proposed staff comments which make it clear that the

AMENDMENT TO RULE 44 E.

E. Access to hospital records. Any party against whom a civil action is filed for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B. [Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.] Hospital records sought in conjunction with a trial, deposition or hearing shall be subpoenaed in accordance with Rule 55 H. In all other cases the injured party shall produce such party's hospital records when requested under Rule 43.

STAFF COMMENT

The informal method for production of hospital records previously used under Rule 44 E. placed hospitals in the position of deciding what records to produce and what

constitutes reasonable notice. In addition, both federal and state law require that special requirements be met for the production of some types of hospital records. See, e.g., 42 U.S.C. 290dd-3; 42 U.S.C. 290ee-3; 42 CFR 2.1, et seq.; ORS 433.045; and OAR 333-12-260. As a result the Council concluded a more formal process was necessary for production of hospital records. At the same time, the Council attempted to avoid creation of new discovery procedures. Therefore, the amendment to 44 E. provides that when records are sought in conjunction with a trial, deposition or hearing, the existing procedure contained in Rule 55 H. must be used. In all other cases the Council provided that the injured party obtain and provide the records in response to a request for production under ORCP 43 in order to avoid the necessity of a deposition merely to obtain the records. The Council anticipates, however, that in most cases the records will be made available informally by the injured party providing a consent to release the records to the requesting party.

AMENDMENT TO RULE 55 H.

H. Hospital records.

* * *

H.(2) Mode of compliance [with subpoena of hospital records].

If disclosure of hospital records is restricted by law, such records may only be disclosed in accordance with such law. In all other cases hospital records may be obtained by subpoena duces tecum as provided in this section.

STAFF COMMENT

An increasing number of hospital records are subject to special nondisclosure rules under both state and federal law. See, e.g., ORS 433.045; OAR 333-12-260; 42 U.S.C. 290dd-3; 42 U.S.C. 290ee-3. In some cases a subpoena is insufficient to permit disclosure. See 42 CFR 2.1, et seq. The Council therefore amended 55 H.(2) to make it clear that where special criteria, such as a special form of court order, are prerequisites to disclosure, those criteria must be satisfied. For records for which there are no special disclosure

requirements, the traditional subpoena duces tecum is permitted.

purpose of the amendments are to alert attorneys that they will have to comply with special disclosure requirements in some cases, and that the rule was amended to require such compliance.

I would appreciate it if you would give me your thoughts concerning these proposals. Once your suggestions have been incorporated, I think we should immediately try and mail out copies to all of the members of the Council so that they can review them prior to the December 10 meeting.

Very truly yours,

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

Laurence E. Thorp

LET:edk
Enclosure
cc: Ron Marceau

After I prepared this Wm Calkins called and said he objected to the request for production. He would prefer a discovery subpoena duces tecum with ten days prior notice to the other party in instances where there is no deposition or trial scheduled. I will draft a proposal as he has requested as an alternative. Let me know your comments.

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December 1, 1988

Mr. Fredric Merrill
Executive Director
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Eugene, OR 97403

Dear Fred:

As a result of my conversation with Win Calkins and also a subsequent conversation with Mike Starr, I revised the approach to dealing with the hospital records. Attached are amendments to ORCP 44E and 55H. The changes I have made require a subpoena duces tecum in all cases for hospital records sought under ORCP 44E. I have amended 55H, however, to provide that if there is no trial or deposition scheduled, the subpoena will direct delivery of records to the requesting attorney. The procedure will also require ten days' prior notice to the injured party so that a protective order may be sought if appropriate.

Given the fact that the two approaches which I have suggested are somewhat different, it might be appropriate to send copies of both out to all members of the Council for review and discussion at the December 10th meeting.

Very truly yours,

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

Laurence E. Thorp

LET/im
Enclosures
cc: Ron Marceau
Win Calkins
Mike Starr

AMENDMENT TO SECTION 44E

E. Access to hospital records. Any party against whom a civil action is filed for compensation or damages for injuries may [examine and make] obtain copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under [Rule] Section 36B. [Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.] **Hospital records shall be obtained by subpoena in accordance with Section 55H.**

STAFF COMMENT

The informal method for production of hospital records previously used under Section 44E placed hospitals in the position of deciding what records to produce and what constitutes reasonable notice. In addition, both federal and state law require a subpoena or court order for the production

of some types of hospital records. See, e.g., 42 U.S.C. 290dd-3; 42 U.S.C. 290ee-3; 42 CFR 2.1, et seq.; ORS 433.045; and OAR 333-12-260. As a result the Council concluded a more formal process was necessary for production of hospital records. At the same time, the Council attempted to avoid creation of new discovery procedures. Therefore, the Council adopted an amendment requiring records to be obtained in accordance with Section 55H.

AMENDMENT TO SECTION 55H

H. Hospital records.

*** * * ***

H.(2) Mode of compliance [with subpoena of hospital records].

If disclosure of hospital records is restricted by law, such records may only be disclosed in accordance with such law. In all other cases hospital records may be obtained by subpoena duces tecum as provided in this section.

*** * * ***

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, [to the officer or body conducting the hearing at the official place of business.] if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records to the attorney or party requesting the records, then a copy of the subpoena shall be served on the injured party not less than ten days prior to service of the subpoena on the hospital.

STAFF COMMENT

An increasing number of hospital records are subject to special nondisclosure rules under both state and federal law. See, e.g., ORS 433.045; OAR 333-12-260; 42 U.S.C. 290dd-3; 42 U.S.C. 290ee-3. In some cases a subpoena is insufficient to permit disclosure. See 42 CFR 2.1, et seq. Therefore, the Council amended subsection 55H(2) to make it clear that where special criteria, such as a court order with specific findings, are prerequisites to disclosure, those criteria must be satisfied. For records for which there are no special disclosure requirements, the traditional subpoena duces tecum

is permitted.

The Council also amended Section 44E to require that all hospital records be obtained by subpoena (in the absence of the patient's consent). Previously the records were obtained under Section 44E by a party informally requesting the records. Since a subpoena will now be required, it becomes necessary to specify to whom the records are to be delivered. If a trial, deposition or hearing is scheduled, the procedure for delivery is already specified. Since the subpoena will also now be used as a discovery device, it was necessary to provide for delivery to the party seeking the records. Otherwise, the scheduling of a deposition would be required merely to obtain the records.

Service of a subpoena on an adverse party is not normally required. Since the subpoena of hospital records may now be used as a discovery tool, it is necessary to give notice to the affected party so that a protective order could be applied for, if appropriate.

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December 9, 1988

Fredric Merrill, Executive Director
Council on Court Procedures
University of Oregon
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Eugene, OR 97403

Dear Fred:

I am in receipt of a copy of Larry Thorp's letter of November 29, 1988. In my legal practice, I represent Sacred Heart Hospital and over the years have had quite a bit to do with medical records and advising the medical records department of the Hospital.

I have not received that many complaints about requests for medical records under ORCP 44 except that with the increase in personal injury litigation and discovery these days hospital records departments are quite burdened with making copies. I have not been made aware of problems along the lines of what Larry Thorp has indicated to the extent that I would think his change would be needed. However, I will solicit comments from the records people and advise you or Larry further of any thoughts.

My main concern about changing the rule is one of increased litigation expenses for everyone. Every time we institute a new procedure it seems like we generate more paper and motions. In my experience with the existing rule, it works rather expeditiously and without much problem. There is usually one letter to the records department, with a copy to plaintiff's attorney. In lawsuits that I have been involved in since the rule has been instituted, I know of only one procedure where it resulted in needing to seek court determination of an issue in the records. It just seems to me to be a very rare situation in which one party objects to revelation of the records.

A procedure requiring the defense attorney to request the plaintiff's attorney who then requests the plaintiff to obtain records from the hospital and obtain consent forms, etc., would impose considerable more burden than is now already experienced, both for plaintiffs and defendants. Some discovery is already conducted in this fashion. What invariably happens

is the defense attorney sends an appropriate request for production, the plaintiff's attorney then requests the plaintiff to come in and sign the necessary release forms and requests to various institutions, then the requests are sent off to the hospital or institution. Sometimes the wrong release form is signed, the hospital misunderstands, or the client/plaintiff misunderstands or does not return the forms. The defense attorney then sends a follow-up request, the plaintiff's attorney then requests the plaintiff to come in for a meeting but the plaintiff is on vacation. The defense attorney then sends the third request for production followed by a motion to compel. This scenario does not usually occur if documents are requested that the plaintiff or the plaintiff's attorney already have, but I have had experiences with lengthy requests where documents are sought that the plaintiff and/or the plaintiff's attorney have to do a lot of work getting the documents for the defense attorney. In an area where it appears to me there has been a very low level of controversy, I hesitate to impose on the litigating public new and more extensive procedures that will potentially increase the costs of litigation.

Larry Thorp makes an alternative proposal where the records would be subpoenaed by the defense attorney. As I expressed to Larry, the only reservations I have about this are that it should be made clear that the records librarian would then just simply mail the records to the defense attorney's office at the time and place required. I also expressed to Larry that I hoped the proposal would not be interpreted as generating more paperwork requiring a notice for deposition and prior documentation other than simply sending plaintiff's attorney a copy of the subpoena. Also, there is the obvious problem of the expense and time of properly serving the subpoena. It might be well to put a blanket exemption under ORCP 55 D.

In conclusion, I am not fully convinced that current experience warrants a change in this rule. I have not received much suggestion of abuse or problem with the current system. By copy of this letter, I will attempt to solicit input from the hospital records community.

Very truly yours,

Win Calkins

Win/nrs

c: Laurence E. Thorp, Attorney at Law
Vickie Schraudner, Director of Medical Records, Sacred Heart Hospital
Steven H. Pratt, Attorney at Law
Ray Mensing, Oregon Association of Hospitals