

# CRAINE & LOVE

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June 7, 1996

Bill Gaylord  
Attorney at Law  
1400 SW Montgomery St.  
Portland, OR 97201

Re: ORCP 55(I)

Dear Bill:

John Hart and I met to discuss the new legislative changes to ORCP 55(I).

In his May 1, 1996 letter James Walsh raises some legislative concerns.

If this bill was designed to lessen the confusion of doctors about whether or when to provide copies of their charts to third parties, it probably does not accomplish that.

The changes to 55(I) create some serious practical problems. Of main concern is the 24 hour notice. It is clearly inadequate. Minimally, a 15 day notice should be required to make this workable.

I will be out of State at the time of the council meeting on Saturday. I will try to be available by telephone for any discussion on Rule 55(I).

Sincerely yours,

Diana Craine

DC:kms

cc: John Hart  
Maurice Holland



# UNIVERSITY OF OREGON

April 24, 1996

Mr. Rudy R. Lachenmeier  
Lachenmeier Enloe & Rall  
2149 NE Broadway  
Portland, OR 97232

Dear Rudy:

Re: ORCP 55 I

I'll bet that, after all this time, you were beginning to think that I had forgotten about your question regarding where 55 I came from and what it was intended to accomplish. However, while I no longer have a memory as good as an elephant, I do take notes of Council matters to attend to, so that sooner or later they get done. The hold up here was in tracking down Tom Cooney, who is general counsel of the OMA and who had a lot to do with getting 55 I enacted in the '95 legislature.

Mr. Cooney was very forthcoming when I finally reached him. He told me that the problem with which 55 I was intended to deal was that of OMA member physicians being served with subpoenas for patient records with no indication whether the patient had waived the physician-patient privilege, which left to physicians the hassle of contacting the patient or his or her attorney to find out about waiver. The purpose of 55 I was to alleviate the burden on physicians when served with this sort of subpoena, by shifting the burden of documenting waiver to the party issuing the subpoena. Mr. Cooney added that, despite the 14 days for compliance allowed by ORCP 55 B, physicians were sometimes confronted with demands for immediate production of subpoenaed records, which he said only increased the burden on them. He also emphatically assured me that 55 I was not intended to have any affect on the scope of the physician-patient privilege, its waiver, or anything of that sort.

Speaking of subpoenas, a lawyer in Portland called me yesterday to report that some attorneys are apparently circumventing the seven-days-notice-to-other-parties requirement of 55 D applicable when a subpoena commands production to an attorney's office. This circumvention, she reported, takes the form of serving a subpoena which does command the person subpoenaed to produce the records at a deposition, but with the bottom of the subpoena stating that the deposition will not occur if the materials are forwarded to the subpoenaing party's attorney directly by a certain date. I asked the attorney who called me to send me a copy of a subpoena of this sort which, if I receive it, I'll distribute at a Council meeting. My

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initial reaction was that if this sort of thing is happening and is causing problems, it does not seem to be something the Council can rectify, since it appears to be just a case of crudely disguised non-compliance with 55 D(1). The remedy would seem to me for an attorney for a party who did not get the seven-days notice to move to quash or exclude any materials produced. Is this something the Council should worry about? (Don't take the trouble to answer that query by responding to this letter. You can tell the Council anything you know about this at a meeting when this comes up as an item of new business.)

With best regards,

Cordially,

Maurice J. Holland  
Professor of Law

Proposal for ORCP 55 I

*Proposal*

If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient. The health care provider shall be directed by the subpoena to produce the medical records to the attorney representing the patient or health care recipient. Within 10 days of the receipt, the attorney shall produce the medical records to the requesting party or assert an applicable privilege.

**HOFFMAN, HART & WAGNER**

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August 27, 1996

Via Facsimile

Ms. Gilma Henthorne  
 University of Oregon  
 School of Law  
 1101 Kincaid Street  
 Eugene, OR 97403-1221

Dear Gilma:

In answer to Maury's call to action, I have spoken with Tom Cooney and crafted two alternative proposals for the Council's consideration at its September 14 meeting relating to ORCP 55 I. Subsection (2) of this rule contains a somewhat controversial 24-hour notice requirement that most Council members believe should be 15 days. Rudy Lachenmeier made the noteworthy suggestion that, sometimes, less than 15 days is required. Consequently, and with the concurrence of Tom Cooney who originally drafted 55 I on behalf of the Oregon Medical Association, I inserted language permitting the court to enlarge or shorten the 15-day period. At our next meeting, therefore, Council members can approve a 15-day modification or, preferably, the 15-day - unless the court orders otherwise - proposal. I enclose copies of both proposals.

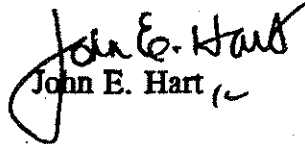
Finally, in accordance with the express wishes of several Council members, I have inserted a short comment to the effect that ORCP 55 I does not change the various health care provider-patient privileges set forth in Oregon Rules of Evidence 504, 504-1, 504-2, 504-4, and 507.

Maury might want to alter the format of the comment.

Ms. Gilma Henthorne  
August 27, 1996  
Page 2

I hope this proposal reaches you in adequate time to distribute it to other members of the Council.

Best personal regards,

  
John E. Hart

JEH:clh  
enclosures

cc: Diana Craine  
William Gaylord  
Rudy Lachenmeier

**Council on Court Procedures**  
**Amendments to ORCP 55 I(2)**  
**Relating to Subpoenaing Medical Records**

Proposed Language A:

I(2) *Manner of Service.* If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient at least ~~24 hours~~ 15 days before the subpoena is served on a custodian or other keeper of medical records. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ORCP 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient at least ~~24 hours~~ 15 days before the subpoena is served on the custodian or other keeper of medical records. Service on a patient or health care recipient under this section must be made in the manner specified by ORCP 7 D(3)(a) for service on individuals.

Proposed Language B:

I(2) *Manner of Service.* If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient ~~at least 24 hours~~ 15 days before the subpoena is served on a custodian or other keeper of medical records. This 15-day period may be shortened or lengthened as the court may direct. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ORCP 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient ~~at least 24 hours~~ 15 days before the subpoena is served on the custodian or other keeper of medical records. This 15-day period may be shortened or lengthened as the court may direct. Service on a patient or health care recipient under this section must be made in the manner specified by ORCP 7 D(3)(a) for service on individuals.

Proposed Comment: ORCP 55 I does not change the various doctor-patient privileges set forth in Oregon Rules of Evidence 504, 504-1, 504-2, 504-4, and 507.

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HEATHER L. KARABEIKA

September 10, 1996

\*WASHINGTON AND OREGON BARS

Via Facsimile OnlyGilma Henthorne  
University of Oregon School of Law  
1101 Kincaid Avenue  
Eugene, Oregon 97402

Re: ORCP 55

Dear Gilma:

Somehow I managed not to touch bases with John and Diane, but I do have my own draft version of 55I and it is enclosed herein. The major difference between the approach I took and the approach John took, is that I want to exempt completely from the rule subpoenas where a court, or in some cases, an arbitrator, has the ability to rule on the discoverability of the records. In a trial, other court proceedings, or an arbitration, you almost always have another side represented, and you always have a third party who can handle both the discovery issue and the admissibility issue. While I appreciate John's attempt to take into account my concerns, I still do not want to have to go to a court and ask to shorten the length of time to subpoena additional records. More than once a year, probably two or three times a year, my office finds out for the first time at trial about yet another medical provider that plaintiff had seen before, and we subpoena, while trial is going on, these additional records. When they arrive, the court then reviews them to determine whether I can look at them and then whether I can use them. But I do not have to tell anybody that I am going to do this, and I certainly do not apply to the court for permission to do this. I think that should continue to be the rule. Again, my apologies to both John and Diane for somehow managing not to get together with them concerning 55I.

Sincerely yours,

LACHENMEIER, ENLOE &amp; RALL

  
Rudy R. Lachenmeier

RRL:kf

cc: Bill Gaylord  
Diane Crane  
John Hart



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LACHENMEIER, ENLOE &amp; RALL

  
Rudy R. Lachenmeier

RRL:kf

cc: Bill Gaylord  
Diane Crane  
John Hart

ATTACHMENT C-4

## Proposed Amendment to ORCP 55 I

## ORCP 55 I

1(1) *Service on Patient or Health Care Recipient Required.* Except as provided in subsection 3 of this section, a subpoena duces tecum for medical records served on custodian or other keeper of medical records, ~~other than a subpoena requiring production before a judge or arbitrator,~~ is not valid unless proof of service of a copy of the subpoena on the patient or health care recipient, made in the same manner as proof of service of a summons, is attached to the subpoena served on the custodian or other keeper of medical records.

I(2) *Manner of Service.* ~~Other than subpoenas for records to be produced before a judge or arbitrator,~~ if a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient at least ~~24 hours~~ ~~34 days~~ before the subpoena is served on a custodian or other keeper of medical records. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ORCP 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient at least ~~24 hours~~ ~~14 days~~ before the subpoena is served on the custodian or other keeper of medical records. Service on a patient or health care recipient under this section must be made in the manner specified by ORCP 7 D(3)(a) for service on individuals.

I(3) *Affidavit of Attorney.* If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is valid if the attorney for the person serving the subpoena attaches to the subpoena the affidavit of the attorney attesting to the following: (a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and (c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

I(4) *Application.* The requirements of this section apply only to subpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550, a health care service

contractor as defined in ORS 750.005, a home health agency licensed under ORS chapter 443 or a hospice program licensed, certified or accredited under ORS chapter 443