* * * NOTICE * * *
PUBLIC MEETING
COUNCIL ON COURT PROCEDURES

Saturday, April 8, 2000
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Call to order (Mr. Alexander)
2. Approval of minutes of February 12, 2000 meeting (attached)
3. Reports regarding items of pending business:
   a. ORCP 44/55 Subcommittee
   b. ORCP 7 Subcommittee
   c. Jury Reform Subcommittee
   d. ORCP 44 A Subcommittee
   e. ORCP 21 A(3) Subcommittee
   f. ORCP 22 C Subcommittee
   g. ORCP 34 B(2). Mr. Brothers
   h. ORCP 54 E Subcommittee (Attachment A)
   i. ORS 1.735(2)("exact language" requirement). Justice Durham, Judge Harris
4. Old business
5. New business
6. Adjournment

# # # # #

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of February 12, 2000
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present: J. Michael Alexander
Lisa A. Amato
Richard L.Barron
Benjamin M.Bloom
Kathryn H. Clarke
Allan H. Coon
Don A. Dickey
Robert D. Durham
William A. Gaylord
Mark A. Johnson
Virginia L. Linder
John H. McMillan
Karsten H. Rasmussen
Ralph C. Spooner
Nancy S. Tauman

Excused: Bruce J. Brothers
Lisa C. Brown
Ted Carp
Kathryn S. Chase
Michael H. Marcus
Connie Elkins McKelvey

The following guests were in attendance: Attorney David S. Barrows, representing the Oregon Association of Process Servers (OAPS), and Amanda Rich, lobbyist for OAPS. Also present were Maurice J. Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Alexander). Mr. Alexander called the meeting to order at 9:36 a.m.

Agenda Item 2: Approval of minutes of January 8, 2000 Council Meeting (Mr. Alexander). The minutes of the January 8, 2000 Council meeting were approved as distributed with the agenda of this meeting with the following corrections: On p. 2, under Election of Council Officers, change the second sentence to read: "This motion was agreed to and the slate was approved by unanimous voice vote"; on p. 4, third line of second complete paragraph, insert "federal" between "new" and "regulations," and at the beginning of the first sentence under "Jury Reform" change "Ms." to "Mr."

Agenda Item 3: Reports regarding items of pending business (Mr. Alexander). (Note that, in order to accommodate guests, the following items were taken up in the order shown below rather than the order indicated in the agenda of this meeting.)

a. Report of ORCP 7 Subcommittee (Judge Rasmussen). Judge Rasmussen stated that drafting of some proposed amendments, responsive to concerns expressed by the OAPS and others, was underway, and that he expected draft amendments would be ready for submission to the Council at its next meeting. Some members

commented that they questioned whether it is within the Council's authority to place obligations on non-parties, specifically employers, such as constituting them agents of employees for purposes of accepting service or mandating that they make employees personally available to be served. Mr. McMillan asked whether any provision should be made to protect employees who might not understand English. Mr. Barrows responded that the OAPS would consider this question, and report any suggestions it might have in that regard to the subcommittee.

b. Report of the ORCP 44/55 Subcommittee (Mr. Gaylord). Mr. Gaylord reported that this subcommittee was working its way through several alternative drafts of proposed amendments to deal with these difficult issues, and that it expected that some specific amending language would be ready for submission to the Council at its next meeting.

c. Report of Jury Reform Subcommittee (Mr. Alexander). In the absence of Judge Harris, subcommittee chair, Mr. Alexander commented that he had been in contact with Ms. Susan Grabe and had discussed with her the fact that, in addition to the Council, at least two other organizations are currently working on the general topic of jury reform, they being the OSB Procedure & Practice Committee and the Civil Law Advisory Committee. Mr. McMillan reported that Judge Harris was in the process of setting up a telephone conference to include all subcommittee members, and expected that would occur in the near future.

Mr. Alexander asked Mr. Spooner to provide him with the name of the president of the Arizona counterpart of the OADC so he might contact the latter to find out how jury reform was working out in that state. Mr. Gaylord stated that he would be opposed to any proposal whereby the identities of alternate jurors would not be disclosed to parties at the outset of trial. Judge Dickey noted that his practice, provided the parties consent, has been to give alternate jurors the option of leaving at the end of trial or remaining throughout the remainder of proceedings strictly as observers.

d. Report of ORCP 44 A Subcommittee (Justice Durham). Justice Durham reported that the subcommittee had been hard at work, particularly in collecting such pertinent material as Oregon cases, rules or statutes from other states, and bar journals. Given the difficulty of the subject and the mass of materials available for study, Justice Durham said he could not give a firm prediction as to when draft proposed amendments would be ready for the Council's consideration.

e. Report regarding ORCP 21 A(3) (defense of prior action pending--see Attachment A to agenda of this meeting) (Prof. Holland). Prof. Holland explained the concern he had with the present provision, and why he thought it should be amended to provide for a discretionary stay rather than an apparently mandatory dismissal. He added that, should the Council

consider amending section 21 A, one issue it should probably resolve is the scope of its application, that is, whether it would apply only to prior actions pending in an Oregon state court, to any federal or state court in Oregon, or to any court in the United States.

Justice Durham said that his understanding of the present 21 A(3) was that it placed a pleading burden on a party which wished to raise the issue of a prior pending action, but did not place any particular obligation on the court. Mr. Bloom stated that his understanding was that he, along with other members, was supposed to work on this issue, and that he would prepare a memo to the Council before further deliberations on this issue. He added that he thought that, even after a motion to dismiss on the basis of a prior action pending has been granted, the court retains discretion to delay ordering entry of judgment of dismissal, which would be the functional equivalent of a stay of dismissal. Mr. Spooner commented that his experience suggested that the present language of the provision affords adequate flexibility. Judge Linder briefly described a recent case where, in the context of a divorce and property division, the Oregon court lost subject-matter jurisdiction following its initial dismissal because a court of another state granted a divorce to the parties.

Discussion of this item concluded with appointment of a subcommittee to consider it further consisting of Mr. Bloom, Mr. Johnson, and Judge Linder.

f. Report regarding ORCP 22 C (impleader and comparative fault--see Attachment B to agenda of this meeting) (Prof. Holland). Prof. Holland reminded members that a problem with this provision had been encountered by a Portland practitioner, who phoned him to bring it to the Council's attention. The problem appeared to be, he continued, that 22 C permits impleader of a third-party defendant only when a third-party plaintiff alleges some form of liability running from the former to the latter, which is not the case in situations where the relatively new comparative fault statutes apply. In addition to attempting to deal with that problem, Prof. Holland added that his proposed amendment would also shorten the time within which a third-party complaint may be served without leave of court or agreement of other parties from 90 to 30 days, and would provide that when that period has expired, service of a third-party complaint would require either consent of the other parties or leave of court, but not both.

The general sense of the members was that the 90-day period had worked well, and therefore should not be changed. Judge Barron stated that he thought the requirement in the present language, that both consent of the parties and leave of court are needed to authorize service of a third-party complaint after 90 days, should be retained. Justice Durham commented that he would have difficulty with any provision which authorized joinder of new

parties merely for the purpose of comparing their possible fault with that of the original defendant.

At the conclusion of this discussion Mr. Alexander appointed Judge Barron, Mr. Bloom, and Mr. Gaylord as a subcommittee to consider this matter further and report back to the Council.

g. Report regarding ORCP 67 C(2) (limitation of damages awarded by judgment--see Attachment C to agenda of this meeting) (Prof. Holland). Several members noted that this issue had a history, including a period of time when no specific amount of damages needed to be stated in the prayer for relief. No members expressed a sense that any problems are being encountered under the current language of this subsection. Mr. Spooner's motion, seconded by Judge Dickey, to table this item was then agreed to by unanimous voice vote.

h. Report regarding ORCP 34 B(2) (substitution of personal representative). In Mr. Brothers' absence, further discussion of this item was deferred to a future meeting.

i. Report regarding ORCP 54 E (possible conflict of interest) (Justice Durham). Justice Durham reminded members that the issue had been suggested to the Council for its consideration by footnote 4 in *For Counsel, Inc. v. Northwest Web Co.,* 329 Or 246, _P2d_ (1999). The question is whether the existing language of 54 E creates a possibility of a conflict of interest between a client and his or her attorney when an offer of judgment is made. Justice Durham added that, to the extent a difficulty does exist under the current language of the provision, it will not be simply to craft a solution, and that he would welcome suggestions from other Council members or possibly appointment of a subcommittee to work with him. In response to this suggestion Ms. Amato, Mr. Johnson, and Ms. Tauman agreed to serve with Justice Durham as a subcommittee to address this issue.

j. Report regarding "exact language" requirement of ORS 1.735(2) (Justice Durham). Justice Durham reminded members that Judge Harris and he had been appointed to give some thought to this statutory matter. He added that he had not yet been able to get together with Judge Harris, but expected that that would happen reasonably soon, and that whatever conclusions they reached would be reported to the Council in a timely manner.

Agenda Item 4: Old business (Mr. Alexander). Prof. Holland reminded the meeting of the letter dated 12-15-99 from Mr. Richard Weill suggesting that any provisions of the ORCP which require that lawyers execute affidavits should be changed to require certifications instead. There was general agreement that, at some future meeting, Prof. Holland would report to the Council on all ORCP provisions requiring affidavits on the part of attorneys where substitution of certification might be appropriate.

Agenda Item 5: New business (Mr. Alexander). Discussion occurred as to the advisability of holding the scheduled March Council meeting. This concluded with general agreement that the March meeting would not be canceled at this time, but that, depending on information Mr. Alexander would receive from the ORCP 44/55 and other subcommittees as to their progress with drafting, he would retain the option of canceling the March meeting should that seem desirable.

Agenda Item 6: Adjournment (Mr. Alexander). On motion made, duly seconded, and agreed to, the meeting was adjourned at 11:55 a.m.

Respectfully submitted,

Maury Holland
Executive Director

RECEIVED FEB 28 2000

MEMO

TO: J. Michael Alexander

FROM: Committee on ORCP 54 E:
Nancy S. Tauman
Lisa A. Amato
Mark A. Johnson
Robert D. Durham

RE: ORCP 54 E

DATE: February 25, 2000

The Committee on ORCP 54 E met on February 24, 2000 in Portland. After extensive discussion, the Committee unanimously recommends the amendments to ORCP 54 E reflected on the enclosure (new matter in boldface; existing wording to be deleted in italics and brackets).

cc: Prof. Maury Holland

ORCP 54 E

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, **exclusive of attorney fees, costs, and disbursements**, 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 **the parties** agree[*d upon*] otherwise by **a separate agreement** [*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, prevailing party fees, disbursements, or 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, not including prevailing party fees, from the time of the service of the offer.

Attachment to Agenda of 4-8-00 Meeting

Oregon

John A. Kitzhaber, M.D., Governor

Department of Administrative Services
State Controller's Division
155 Cottage Street NE
Salem, OR 97310-0310
(503) 378-3156
FAX (503) 378-3518

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FEB 23 2000
OSCA

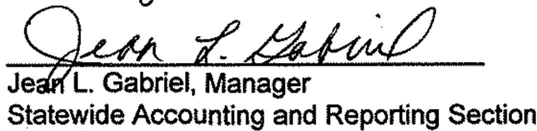
CAFR☆Gold Star '99

Date: February 15, 2000

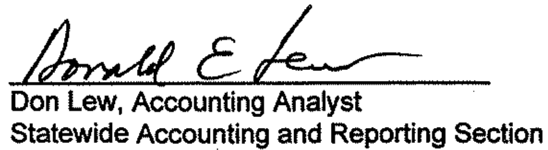
To: MAURICE J HOLLAND,
COUNCIL ON COURT PROCEDURES - AGY 16700

From:

John J. Radford, Administrator



Jean L. Gabriel, Manager
Statewide Accounting and Reporting Section



Don Lew, Accounting Analyst
Statewide Accounting and Reporting Section

Subject: **1999 GOLD STAR CERTIFICATE**

It is a great pleasure to inform you that your agency has earned the 1999 State Controller's Gold Star Certificate. Congratulations to you and your fiscal staff for this outstanding work.

The State Controller's Gold Star Certificate is presented to state agencies that provide accurate and complete fiscal year end information in a timely manner. Clearly, the Gold Star is a challenge to earn, and its achievement is due primarily to your agency's diligent efforts to maintain accurate and complete accounting records throughout the fiscal year.

We particularly want to commend your agency's lead CAFR accountant, **TRESSA PERLICHEK** who worked directly with us to ensure accurate and timely year end reporting. The Gold Star Certificate was awarded to your agency's CAFR accountant earlier this month.

Your agency's participation in the Gold Star Certificate program is important to Oregon in meeting statewide fiscal performance goals and key to the timely preparation of Oregon's Comprehensive Annual Financial Report and the statewide Schedule of Expenditures of Federal Awards. Your agency's success in accounting and financial reporting is also critical to Oregon's success in receiving a favorable audit opinion on both statewide documents.

The State Controller's Gold Star Certificate is Oregon's equivalent to the internationally recognized GFOA Certificate of Achievement for Excellence in Financial Reporting. Through the collaborative team effort of state agencies and the State Controller's Division, Oregon has earned the GFOA Certificate every year since 1992. Clearly, *Gold Star agencies* are key to making this possible! We appreciate your agency's commitment to teamwork and excellence in financial reporting.

We are very happy to recognize your agency with this award. The diligent efforts of your fiscal staff truly make a difference in statewide accounting and reporting endeavors and in attaining related Oregon Benchmarks.

cc: CAROL COLLEY
TRESSA PERLICHEK

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Note: All credit for this belongs to Wilma. She has always kept the Salem inquisitors happy without ever having to bother me, who couldn't be of any help anyway. As some of you will recall from our last award, this carries with it a new Lexus 400 for the use of the Executive Director.
M.T.H.

COUNCIL ON COURT PROCEDURES

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Telephone: (541) 346-3990
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April 1, 2000

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland

Re: Proposed Amendments to ORCP 7 D

Please add the attached to the agenda of the April 8 meeting as Attachment B thereto. It consists of amendments to ORCP 7 D proposed by the Rule 7 Subcommittee (Judge Rasmussen, chair; Mr. Bloom, Ms. Clarke, and Mr. Johnson, members) which seek to respond to suggestions by Mr. Bloom, Mr. Dan Reitman, and the OAPS.

The Rule 7 Subcommittee thinks it best to provide alternative versions of some of these proposed amendments. Alternative versions are shown as Alternatives A and B.

Enc.

cc: Notice to Public

Attachment B to Agenda of April 8, 2000 Meeting

Rule 7 Subcommittee's Proposed Amendments to ORCP 7
(March 31, 2000)

{Matter to be added in **bold and underlined**; to be deleted [*italicized enclosed in square brackets*]}

1 RULE 7. SUMMONS

2 * * * *

3 D(2)(d)(ii) **Calculation of time.** For the purpose of
4 computing any period of time provided by these rules or by
5 statute, service by mail, except as otherwise provided, shall be
6 complete on the day the defendant**, or other person authorized**
7 **by appointment, by law, or designated by this section to**
8 **receive service on the defendant's behalf,** signs a receipt
9 for the mailing, or three days after the mailing if mailed to an
10 address within the state, or seven days after the mailing if
11 mailed to an address outside [*of*] the state, whichever first
12 occurs

13 * * * *

14 D(3)(a)(i) **Generally.** Upon an individual defendant, by
15 personal [*service upon*] **delivery of a true copy of the**
16 **summons and the complaint to** such defendant or **to** an agent
17 authorized by appointment or law to receive service of summons **on**
18 **behalf of such defendant**, or

19 ***Alternative A***

20 [*, if defendant personally cannot be found at defendant's dwelling*

21 *house or usual place of abode, then*]

22 ***Alternative B***

23 [*, if defendant personally cannot be found at defendant's dwelling*
24 *house or usual place of abode,*]**, provided at least one attempt**
25 **is made to effect service at the defendant's dwelling**
26 **house or usual place of abode,** then

27 by substituted [*, or by office service*] **or office** service upon
28 such defendant or agent. [*Service may also be made upon an*
29 *individual defendant to whom neither subparagraph (ii) nor (iii)*
30 *of this paragraph applies by mailing made in accordance with*
31 *paragraph (2)(d) of this section provided the defendant signs a*
32 *receipt for the certified, registered or express mailing, in which*
33 *case service shall be complete on the date on which the defendant*
34 *signs a receipt for the mailing.*] **If an individual defendant**
35 **has a place of regular employment at the time of service,**
36 **service on such defendant may also be made by personal**
37 **delivery of a true copy of the summons and the complaint**
38 **to the personnel manager or other person having equivalent**
39 **duties located at such place of employment, but service by**
40 **this method shall not be complete until the latest date on**
41 **which a true copy of the summons and the complaint,**
42 **together with a statement of the date, time, and place at**
43 **which personal delivery was made, are mailed to the**
44 **defendant by**

45 ***Alternative A***

46 **first-class mail**

47

48 ***Alternative B***

49 **first-class mail and by certified or registered mail,**
50 **return receipt requested, or express mail,**

51 **at any residence address known to the plaintiff and to the**
52 **place of employment. Service may also be made upon any**
53 **defendant as specified in this subsection, except a minor**
54 **as specified in paragraph (a)(ii) thereof or an**
55 **incapacitated person as specified in paragraph (a)(iii)**
56 **thereof, by mailing in accordance with paragraph (2)(d) of**
57 **this section provided that the defendant or other person**
58 **authorized by appointment, by law, or designated by this**
59 **section to receive service on the defendant's behalf,**
60 **signs a receipt for the certified, registered or express**
61 **mailing, in which event service shall be complete on the**
62 **date on which the defendant or other person so authorized**
63 **or designated signs a receipt for the mailing.**

64 * * * *

65 D(4)(a) **Actions arising out of the use of roads,**
66 **highways,** [*and*] **or premises open to the public; service by**
67 **mail.**
68 D(4)(a)(i) In any action arising out of any accident,
69 collision, or other event giving rise to liability in which a
70 motor vehicle may be involved while being operated upon the roads,
71 highways, [*or*] streets of**, or premises open to the public as**
72 **defined in ORS 801.400 within,** this state, if the plaintiff
73 makes at least one attempt to serve the defendant who operated
74 such motor vehicle, or caused it to be operated on the defendant's
75 behalf, by a method authorized by subsection (3) of this section

76 except service by mail pursuant to subparagraph (3)(a)(i) of this
77 section and, as shown by its return, did not effect service, the
78 plaintiff may then serve that defendant by mailings made in
79 accordance with paragraph (2)(d) of this section addressed to that
80 defendant at;
81 * * * *

82 D(4)(b) **Notification of change of address.** [*Every*
83 *motorist or user of the roads, highways, or streets of this state*]
84 **Any person** who, while operating a motor vehicle upon the roads,
85 highways, [*or*] streets of**, or premises open to the public as**
86 **defined in ORS 801.400 within,** this state, is involved in any
87 accident, collision, or other event giving rise to liability,
88 shall forthwith notify the Department of Transportation of any
89 change of such defendant's address occurring within three years
90 after such accident, collision, or event.
91 * * * *

COUNCIL ON COURT PROCEDURES

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April 5, 2000

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland, Executive Director

Enclosed is a version (with a different font size) of Bill Gaylord's draft amendments to ORCP 44/55. More copies will be available at the April 8 meeting.

Enc.

FINAL WORKING DRAFT - 4/3/00

Amendments to ORCP 44:

RULE 44. PRETRIAL DISCOVERY OF HEALTH CARE RECORDS; PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS[1]

A. Order for examination.

[text unchanged]

B. Report of examining physician or psychologist.

[text unchanged]

~~**C. Reports of examinations; claims for damages for injuries.** [delete text of section in its entirety]~~

C. Health Care Records.

C(1) As used in this rule, "health care records" means medical records as defined in ORS 192.525(8), and health care records of a health care provider as defined in ORS 192.525(9) and (10), and health care records of a

community health program established under ORS 430.610 through 430.695.]

C(2) *Pretrial discovery of health care records from a party.* Any party against whom a civil action is filed for damages for injuries to the party or to a person in the custody or under the legal control of a party, or for damages for the death of a person whose estate is a party may obtain copies of all health care records within the scope of discovery under Rule 36 B by either

(a) serving a request for production for such records on the injured party or its legal custodian or guardian pursuant to ORCP 43; or

(b) obtaining the voluntary written consent to release of the records to such party from the injured party or its legal custodian or guardian before seeking them from the health care provider.[2]

C(3) *Pretrial discovery of Health Care Records directly from health care provider or facility.* Health care records within the scope of discovery under Rule 36 B may be obtained by a party against whom a civil action is filed for damages for injuries to the party or to a person in the custody or under the legal control of a party, or

for damages for the death of a person whose estate is a party, only by the procedure described in section (2)(b) above, or by the procedures described in ORCP 55 H, Pretrial subpoena of Health Care Records from health care provider or facility.[3]

~~**D. Report; effect of failure to comply.** [delete section in its entirety]~~

~~**E. Access to hospital records.** [delete section in its entirety]~~

*   *   *   *   *   *   *

Amendments to ORCP 55 H.

RULE 55. SUBPOENA

[A. through G. unchanged.]

H. Pretrial subpoena of health care records from health care provider or facility.

~~[H(1) *Hospital.* delete text entirely]~~

H(1) For purposes of this section, "health Care records" are defined in ORCP 44 C (1).

H(2) Except when it is provided with a voluntary written consent to release of the health care records pursuant to ORCP 44 C(2)(b), any party against whom a civil action is filed for damages for injuries to the party or to a person in the custody or under the legal control of a party, or for damages for the death of a person whose estate is a party, may obtain copies of health care records within the scope of discovery under Rule 36 B directly from a health care provider or facility only by serving upon the party whose health care records, or whose decedent's health care records are sought:[4]

(a) a form of SUBPOENA for such records directed to the health care provider, accompanied by statutory witness fees calculated as for a deposition at the place of business of the custodian of the records, and

(b) simultaneously, an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS in the form provided by ORS 192.525(3), on which the following information has been designated with reasonable particularity: the name of the health care provider or providers or facility or facilities from which records are sought, the categories

or types of records sought, and the time period, treatment, or claim for which records are sought. If the name of a health care provider or facility is unknown to the party seeking records, they may designate "all" health care providers or facilities, or "all" of them within a described category. The AUTHORIZATION shall designate the attorney for the party whose records are sought, or that party if unrepresented, as the persons to whom the records are released.[5]

H(3) Within 14 days after receipt of service of such a SUBPOENA and AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS, a party whose records are sought shall:

(a) as to any part of the request to which it does not object, obtain the signature of a person able to consent to the release of the requested records or authorized by law to obtain the records, as used in ORS 192.525 (2), and a date of signature, on the AUTHORIZATION and, either

(i) return it to the requesting party for its use in obtaining records directly from the health care provider(s) or facility(s),

or

(ii) serve the SUBPOENA and AUTHORIZATION by mail on the health care provider or providers

or facility or facilities indicated, along with the STATEMENT OF INSTRUCTIONS provided in section 3 below; and

(b) as to any part of the SUBPOENA and AUTHORIZATION to which it does object, serve a written objection pursuant to ORCP 43 B on the party seeking the discovery.[6]

H(4) Upon receipt of an objection to all or part of a SUBPOENA and AUTHORIZATION pursuant to subsection (2)(b) above, the party issuing the SUBPOENA and AUTHORIZATION may seek an order compelling discovery, pursuant to ORCP 46.

H(5) Upon serving an objection to part or all of a SUBPOENA and AUTHORIZATION pursuant to subsection (2)(b) above, the objecting party may seek an order limiting extent of disclosure, pursuant to ORCP 36 C.[7]

H(6) *Statement of instructions*. Along with a SUBPOENA and AUTHORIZATION for health care records directly from a health care provider or facility hereunder, the party whose records are sought shall prepare and serve on the hospital or health care provider

with the AUTHORIZATION the following STATEMENT OF INSTRUCTIONS:[8]

(a) Enclosed with this STATEMENT OF INSTRUCTIONS is a statutory SUBPOENA and AUTHORIZATION TO DISCLOSE MEDICAL RECORDS pursuant to ORS 192.525(3) which has been signed by a person able to consent to the release of the requested records or authorized by law to obtain the records. Copies of the designated records are sought by each of the following parties:

i. [name and address of person whose records are sought, or their attorney]

ii. [name and address of each other party or their attorney who seeks access to the records]

(b) In order to comply with this Authorization and these instructions, please make ___ copies of the designated records, place each copy in a separately sealed package bearing the address and postage to each of the names identified above, and place all of them together in one package or shipment, and mail that package within 5 days of this date to the person whose records are sought or their representative, whose name and address are listed first above. Only ___________ [name of person or their

attorney whose records are sought] is authorized to receive the copies of these records directly from you. [9]

(c) The STATEMENT OF INSTRUCTIONS shall be signed by the party whose records are sought, or their attorney, and a copy served with a certificate of service pursuant to ORCP 9 C on each party, or their attorney, seeking discovery of the health care records.

H(7) ~~[H(2)]~~ *Mode of Compliance*. [existing first paragraph of 55 H(2) verbatim, but with "hospital records" changed to "health care records" and "hospital" changed to "health care provider"] **Health care** ~~[Hospital]~~ records may be obtained by subpoena **pretrial** only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law have been complied with and such compliance is evidenced through an appropriate court order or through execution of an appropriate consent. Absent such consent or court order, production of the requested records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate consent or court order does accompany the subpoena, then production of all records requested shall be considered production of the records responsive to the

subpoena.[10]

H(7)(a) ~~[H(2)(a)]~~ [Existing 55 H(2)(a) as is with these same changes of terminology] Except as provided in subsection ~~[(4)]~~ **(9)** of this section, when a subpoena is served upon a custodian of ~~[hospital]~~ **health care** records in an action in which the ~~[hospital]~~ **health care provider** is not a party, and the subpoena requires the production of all or part of the records of the ~~[hospital]~~ **health care provider** relating to the care or treatment of a patient ~~[at]~~ **of** the ~~[hospital]~~ **health care provider**, it is sufficient compliance therewith if a custodian delivers by mail or otherwise [a] **the number of** true and correct cop~~[y]~~**ies** of all the records responsive to the subpoena **indicated in the subpoena or statement of instructions**, within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection ~~(3)~~ (8) of this section. The cop~~[y]~~**ies** may be photographic or microphotographic reproduction.

H(7)(b) ~~[H(2)(b)]~~ [Existing 55 H(2)(b) modified consistent with STATEMENT OF INSTRUCTIONS in H(6) above] The cop~~[y]~~ies of the records shall be separately enclosed in ~~[a]~~ sealed envelope**s** or wrapper**s** on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelopes or wrappers shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed **to the person whose records are**

sought or their representative, whose name and address are listed in the STATEMENT OF INSTRUCTIONS, pursuant to section H(6)(a)(ii) herein. [~~ 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 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.~~]

H(8) ~~[H(3)]~~ *Affidavit of custodian of records.*

H(8)(a) ~~[H(3)(a)]~~ The records described in this section shall be accompanied by the affidavit of the custodian of the ~~[hospital]~~ **health care provider**, 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 cop~~[y]~~**ies are** ~~[is]~~ true cop~~[y]~~**ies** of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the ~~[hospital, staff physicians or persons acting under the control of either]~~ **health care provider**, in the ordinary course of ~~[hospital]~~ **its** business, at

or near the time of the act, condition, or event described or referred to therein.

H(8)(b) ~~[H(3)(b)]~~ If the ~~[hospital]~~ **health care provider** 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(8)(c) ~~[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(9) ~~[H(4)]~~ *Personal attendance of custodian of records may be required.*

H(9)(a) ~~[H(4)(a)]~~ The personal attendance of a custodian of [hospital] **health care provider** records and the production of original [hospital} **health care provider** records is required if the subpoena duces tecum contains the following statement:

> The personal attendance of a custodian of ~~[hospital]~~ **health care provider** records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure ~~[55 H(2)]~~ **55 H(7) and (8)** shall not be

deemed sufficient compliance with this subpoena.

H(9)(b) ~~[H(4)(b)]~~ If more than one subpoena duces tecum is served on a custodian of ~~[hospital]~~ **health care provider** 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(10) ~~[H(5)]~~ [~~*Tender and payment of fees.* Nothing in this section requires tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.]~~ ***Fees for copies.*** **A health care provider may charge a reasonable fee for responding to a release authorization or subpoena for health care records. A reasonable fee for copying and providing such records shall not exceed twenty-five cents ($0.25) per page, less any prepaid witness fee, in the absence of personal attendance by the custodian of the records.**[11]

H(11) ***Obligation of party or attorney of party whose health care records are received from health care provider pursuant to subpoena.*** **Upon receipt of the sealed copies of the health care records addressed to each of the parties seeking access to them, the party whose records are sought, or their attorney, shall open only the copy addressed to that party or attorney, and shall have 14**

days in which to review them. Not later than 14 days after receipt of the records from the health care provider or facility, the party whose records are sought shall either serve the unopened copies of the records on each party seeking them, or shall serve each such party with objections to their production pursuant to ORCP 43 B.

H(11)(a) *Privilege or objection log.* When a party objects to the provision of health care records otherwise discoverable by subpoena pursuant to this section, the party shall make the objection expressly and shall describe the nature of the records objected to in a manner that, without revealing information which is privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

H(11)(b) *In camera review.* In the event of a motion to compel production of any health care records which have been received by the party whose records are sought pursuant to this section, that party shall deliver the sealed copies of those records to the court for *in camera* review within the time permitted for filing its response to the motion to compel.

H(12) Nothing contained in this rule, or in the use of the AUTHORIZATION TO DISCLOSE MEDICAL RECORDS shall

constitute a waiver of any common law or statutory privilege against disclosure of any health care records, or any other confidential communication between any party and a health care provider or facility, beyond the contents of the records for which disclosure is specifically authorized, and to the parties to whom disclosure is specifically authorized under this section.

H(13) Any health care records obtained pursuant to this rule shall only be used for purposes of the pending litigation. After the litigation is resolved, the health care records shall be either returned to the party whose records they are or destroyed.

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Amendments to 55 I

RULE 55

I. Subpoena of health care records for trial; attendance of custodian with original records at trial ~~[Medical Records]~~ [Note: all of existing 55 I is deleted, though not shown here][12]

I(1) Notwithstanding Rule 55 H, a subpoena of health

care records to trial may be served directly on the health care facility or its health care records custodian by the party seeking the health care records without an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS described at Rule 55 H(2)(b) above, or a STATEMENT OF INSTRUCTIONS described at Rule 55 H(6) above.

I(1)(a) Except as indicated in section I (2), it is sufficient compliance with such a subpoena if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt thereof, sealed in an envelope addressed to the clerk of the court where the action is pending, accompanied by an affidavit described in ORCP 55 H (8). The copy may be photographic or micro photographic. 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 health care provider or facility, and 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 shall be addressed to the clerk of the court, or to the judge if there is no clerk.

I(1)(b) The package containing records produced in response to a subpoena to trial shall remain sealed and

shall be opened only at the time of trial at the direction of the judge or with agreement of the parties. The records shall be opened in the presence of all parties who have appeared. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian who submitted them.

I(2) The personal attendance of a custodian of health care records and the production of original health care records at a trial or deposition is required if a subpoena duces tecum contains the following statement:

> The personal attendance of a custodian of health care records and the production of the original records is required by this subpoena. The procedures authorized by ORCP 44 C or ORCP 55 H shall not be deemed sufficient compliance with this subpoena.

1. *It is our belief that so long as A and B of rule 44 remain, C, D, and E can be deleted without changing any of the practical effects of these rules, under the assumption that we are now comprehensively providing three alternative methods (request for production, request for signed release, and subpoena-release), and related sanctions, for obtaining what should amount to all medical records. We will need to consider the question whether some parts of D still need to be separately stated, before finalizing our recommendations.*

2. *Re 44 C(2): We do not mean to be inadvertently changing prior rules so as to permit discovery of one person's records from some other person who has no duty or motive to protect them, e.g. a previous party in this action or some other action who has received them for purposes of that previous or other action. Among other things, the above new language intends to make clear this is about getting the patient's records from them, or their legal representative in this action.*

Also, subsection b was added recently to make sure we are not foreclosing practitioners from exchanging a signed release form from the patient which allows another party

to seek the records themselves, as is sometimes done. When that method is not agreeable to the patient or its attorney, or is not sufficient to spring loose the records in the eyes of the provider, or is not adequately certain to get the full records in anyone's mind, the rest of these rules may be invoked.

3. Re: 44C: We have discussed various solutions to the problem of where to put our new rules. We propose this new provision in ORCP 44 as a cross reference to 55H, leaving all subpoena rules and procedures in chapter 55, where someone thinking about it that way would look first, while also guiding the person who looks first in ORCP 44 because it is essentially a matter of pretrial discovery, related by objective to the rest of ORCP 44.

4. Re: 55 H(2): The emphasis on exclusivity of these methods (release signed by patient and given to opponent, or our new subpoena+release method) for getting records "directly" from providers is to avoid questions whether they are still subject to subpoena under the old rules we are trying to replace.

5. An obvious question may be asked: Why does this use both a subpoena and a "release" to get the records. The answer is that the subcommittee wants both the automatic

enforcement mechanisms of the subpoena power, (without the need to invent new mechanisms, or connect into other existing ones), and the additional detailed instructions we are more comfortable placing in the release document. Additionally, combining the two instruments ought to lay to rest any lingering uncertainty among providers about whether a subpoena or a release gives them the broader authority/requirement to comply. Some practitioners have had providers balk at releasing records either because no subpoena or no release signed by the patient had accompanied the request. This may stem from interpretations of the federal statutes protecting certain mental health records, drug records, and perhaps AIDS testing records, which seem to require written consent of the patient regardless of subpoena.

6. *Re: 55H(3)(b): This is our provision of an initial opportunity to assert privilege or scope of discovery objections.*

7. *Re: 55 H(4) and (5): We intend to preserve the two-way street for seeking court guidance or sanction, so that either party can go forward to seek a remedy against the subpoena or its resistance.*

8. *Re: 55 H(6): The reason for this additional*

instructional enclosure is our recognition of the difficulty using rules of civil procedure, which by their nature apply to parties but not strangers to the litigation, to force non-parties to do something. It is not out of the question to make these same instruction into rules mandating action by the recipient of the subpoena, if anyone is concerned that medical providers will resist or fail to comply with these steps.

9. *Re: 55 H(6)(b): The blanks in the instruction form are for flexibility. Intent is that the number of copies will be determined by the number of litigants desiring to receive the production. The name blank is for the party whose records are sought. We should consider whether these points need more spelling out in the rule.*

10. *Re: 55 H(7): This section, with slight word changes, is preserved from the Council's recent amendments to solve problems medical providers had with apparent inconsistencies between our rule and federal protections of certain medical records. We should not have to re-hash that recent work.*

11. *We recognize that any attempt to limit costs of medical records copies may become controversial, but there is a consensus of the subcommittee to "run it up the*

flagpole".

12. *Re: 55 I: We recognize there will be confusion and perhaps unwanted changes in practice if our new discovery procedures are not clearly distinguished from what one does to subpoena medical records to court for trial, or to subpoena records custodians and original records for trial show-and-tell. Because this is a different subject and 55 H is already quite long, using 55 I seems logical for this placement.*