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

Saturday, August 12, 2000
9:30 a.m.
Oregon State Bar Center
5200 S.W. Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Call to order (Mr. Alexander)

2. Approval of minutes of July 15, 2000 meeting (attached)

3. Reports:

A.	ORCP 7 D	(see Attachment 3A)	(Judge Rasmussen)
B.	ORCP 21 A	(see Attachment 3B)	(Judge Linder/Mr. Johnson)
C.	ORCP 22 C	(see Attachment 3C)	(Judge Barron)
D.	ORS 1.735(2)	(see Attachment 3D)	(Justice Durham)
E.	ORCP 44 A	(see Attachment 3E)	(Justice Durham)
F.	ORCP 44/55	(see Attachment 3F)	(Mr.Gaylord)

4. Old business

5. New business

6. Adjournment

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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of July 15, 2000
5200 Southwest Meadows Road
Oregon State Bar Center
Lake Oswego, Oregon

Present:	J. Michael Alexander	William A. Gaylord
	Lisa A. Amato	Rodger J. Isaacson
	Benjamin M. Bloom	Mark A. Johnson
	Ted Carp	Virginia L. Linder
	Kathryn S. Chase	Michael H. Marcus
	Kathryn H. Clarke	Connie E. McKelvey
	Allan H. Coon	Ralph C. Spooner
	Don A. Dickey	Nancy S. Tauman
	Robert D. Durham	
Excused:	Richard L. Barron	
	Bruce J. Brothers	
	Lisa C. Brown	
	Daniel L. Harris	
	John H. McMillan	
	Karsten H. Rasmussen	

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Alexander). Mr. oAlexander called the meeting to order at 9:37 a.m.

Agenda Item 2: Approval of minutes of June 10, 2000 Council meeting. The minutes of the Council's June 10, 2000 were unanimously approved with the following correactions: Justice Durham will be listed as present; on page 2, fourth paragraph, "an" letter will be changed to "a" letter; on page 5, second full paragraph,third line, "... to produce two copies of requested records, one for the subpoenaing party and one for the patient's lawyer. However, ...".

Agenda Item 3: Reports:

3A. ORCP 58--Jury Reform (see Attachment 3A to agenda of this meeting) (Mr. Alexander). Mr. Alexander commented that the only issue respecting these amendments which appeared to be still open was whether proposed ORCP 58 B(9) should specify that jury questions must be in written form, or whether to retain the present proposed language whereby judges would have the option of permitting written or oral questions. The consensus of the

members was that this issue should remain open until the Council's September 9 meeting.

Judge Marcus asked whether there would be any proposal regarding alternate jurors, to which the response was there would be no such proposal at the present time.

3B. ORCP 44 A--IME's (see Attachment 3B to agenda of this meeting) (Justice Durham). Justice Durham stated that the subcommittee had read and carefully considered letters received from Mr. Jonathan Hoffman and Mr. Larry Brisbee (copies of which are filed with the original of these minutes.) He added that the consensus of the subcommittee was that the concerns expressed in those letters were adequately addressed in the currently proposed language of the 44 A amendments, and that no changes were, with one exception, called for. That single exception, he explained, was to add language making clear that if an examination were obstructed, the examination could be continued after the problem had been resolved without the need for a further motion or court order. In other words, if the examining physician believed that the examination is being unreasonably obstructed, he or she could call for a suspension of the examination.

Justice Durham also commented that the subcommittee had made every effort to discourage "lawyering" in connection with these examinations. It was with that thought in mind that the subcommittee decided that any objections, apart from those invoking privilege, should be reserved until trial.

Mr. Spooner asserted that the choice before the Council was to preserve the status quo by doing nothing, which would mean that these problems would continue to be worked out on a case-by-case basis, or try to craft an amendment that would bring greater uniformity and consistency to the area. He added that the only reason an examinee might want to have counsel with him or her during an examination would be so that privileges would not be invaded.

Mr. Bloom said he had some concern that providing that an examinee's counsel may be present might have a chilling effect on the willingness of some doctors to perform IME's. Mr. Gaylord respectfully disagreed with this comment, adding that no one could deny that IME's are, in some respects, adversarial procedures and that the rights of examinees must somehow be protected.

Judge Marcus stated that he thought that greater uniformity was needed in this area, and that something along the lines of the proposed amendments would represent an improvement on the existing situation where no guidance is provided to judges. He expressed concern, however, about whether any worthwhile proposal could

secure the support of at least 15 votes.

Mr. Spooner commented that he was not sure that he could support the proposed amendments in their present form. He added that, if problems respecting protection of privilege arise, it might be preferable if these were resolved in advance of examinations, which would presumably obviate any need to authorize the presence of an examinee's counsel. In response to a question from Judge Dickey, Mr. Spooner responded that he would not object to authorizing the presence of an examinee's representative as long as it is made clear that the representative could not do anything except simply be present for the benefit of the examinee's comfort and peace of mind.

Ms. Tauman reminded members that proposed 44 A(3) provides that the physician or any party is entitled to have a stenographic or audiotape recording of an exam, which she said she thought would deter lawyers from obstructing examinations, especially given the provision for sanctions against anyone found to have engaged in obstruction.

Ms. Clarke stated that the subcommittee had been persuaded of the genuine need for the greater uniformity which the proposed amendments would afford. For example, she said that, at present, in the absence of a rule, some courts order that examinations be recorded, while others do not, and some courts allow the presence of someone accompanying examinees, while others do not.

Judge Isaacson commented that he strongly agreed that there is a need for greater uniformity in how these matters are dealt with. He added that he thought it worth keeping in mind that amended 44 A would allow for solutions to unusual circumstances, first through agreement of the parties about particular conditions, and, failing agreement, the court ordering "other or different conditions [than those that would be provided in the rule] for good cause," in default of which the proposed amendments would provide some very helpful ground rules.

Mr. Spooner remarked that he had some concern that these proposals, in particular the provision authorizing the presence of counsel, would constitute a fundamental change in the way IME's have traditionally been handled in Oregon practice. He added that he understood the reasonableness of allowing the presence of a "support person," but remained skeptical about the presence of a lawyer who might affect the ability of the doctor to conduct the examination in a manner consistent with the standards of the medical profession.

Ms. Clarke observed that, at present, some courts take the position that, because the current rule says nothing about it,

examinees have absolutely no right to ask that any conditions be set. She added that the subcommittee had reached the conclusion that this situation was not satisfactory and should be changed. Thus, she did not disagree with Mr. Spooner's point that these amendments would effect an important change, but said she might differ with him in believing this change would be desirable.

Mr. Gaylord stated that he thought the Council should not be unduly influenced by the fact that some doctors might prefer that counsel not be present, because, whether doctors realize it or not, IME's are inevitably adversarial to some extent.

Justice Durham reminded members that issues of privilege can arise in the context of IME's innocently and by surprise, which is the principal reason why providing that all such issues be thrashed out in advance would not be entirely workable. He added that the subcommittee proposals seemed to him to represent a carefully worked out compromise of views within the subcommittee, and was somewhat surprised to learn that the consensus he thought had been achieved appeared to be less than solid. He further added that the subcommittee would be willing to consider an added provision whereby there would be advance notice to defense counsel of the identity of the examinee's representative and that the examination would be audiotaped if it is thought that would be useful.

Judge Carp said that, in 25 years in practice, he had never experienced a problem with IME's. He asked whether the privilege problem might be solved by a provision to the effect that any statements by examinees in the course of an examination would not waive the privilege. Mr. Gaylord responded that such a provision would not adequately safeguard the privilege, the purpose of which is to preserve confidentiality from anyone, including examining physicians. He added that such a provision would also not solve the problem of doctors asking examinees questions about the facts and circumstances of the accident.

After a brief recess, Mr. Alexander called for straw votes in order to get a sense of the directions in which members were inclined. To the question of how many members believed that some rule was needed to address these issues, 15 members responded in the affirmative. To the question of how many members would support adoption of the presently proposed amendments with suggested modifications, 9 members responded in the affirmative. To the question of how many members would support the presently proposed amendments, but with greater restriction on the presence of counsel, 12 responded in the affirmative.

Mr. Alexander concluded discussion of this item by commending the subcommittee for doing a sterling job on a very difficult

subject, and by commenting that he thought it incumbent on the Council to work through this issue to a satisfactory resolution. Mr. Gaylord said that he would like the subcommittee to consider a provision authorizing the presence of counsel, but possibly limiting counsel's role to objecting solely on grounds of privilege, and perhaps also providing that responses of examinees in the course of IME's could not be used in cross-examination at trial.

3C. ORCP 21 A (see Attachment 3C to agenda of this meeting) (Judge Linder/Mr. Johnson). Judge Linder explained that the problem with which this subcommittee had been dealing was when an action is dismissed in an Oregon court because of the prior pendency of essentially the same action elsewhere, there exists the possibility that if the other action were terminated on some ground not resolving the merits of the dismissed proceeding in Oregon, reinstitution of the latter might be futile for such reason as the expiration of a statute of limitations or loss of subject-matter jurisdiction on the part of the Oregon court as occurred in *Weller v. Weller*, 164 Or App 25, 988 P2d 921 (1999). She added that the subcommiittee's preferred solution was set forth as Alternative A in Attachment 3C, which would authorize the Oregon court to defer dismissal of the action pursuant to ORCP 54 B(3), which she said would be the functional equivalent of a stay.

Ms. Clarke commented that, although she agreed that Alternative A would accomplish what the subcommittee intends, she nevertheless thought that Alternative B would make clearer to judges and lawyers that a stay was essentially what was being sought and the reason for it. Judge Linder responded that the subcommittee thought that Alternative B risked creating the impression that some dramatic change from current practice was contemplated, but that nothing dramatically new was actually needed. Judge Marcus expressed agreement with Alternative A, though he also said that he would like to see the amendment call explicitly for a stay of the action.

Discussion of this item concluded by Judge Linder stating that she and Mr. Johnson would give further thought about whether Alternative B's provision for a stay could be somehow combined with the essential features of Alternative A.

3D. ORCP 54 E (see Attachment 3D to agenda of this meeting) (Justice Durham). Justice Durham referred to a letter from Judge Paul J. Lipscomb (a copy of which is filed with the original of these minutes) questioning the need for this proposed amendment. He stated that he acknowledged, as Judge Lipscomb asserted, that the current proposal did not purport to address all aspects of potential conflicts of interest between clients and their lawyers, but nonetheless believes it did usefully address an

aspect of it that is probably the most glaring one. He added that the potential which exists, under the present 54 E, for putting counsel in a clear conflict of interest with his or her client as to whether to accept a "global offer," is fraught, not only with legal problems, but can be a matter of some embarrassment to the Bar.

Ms. Amato said that she had carefully considered Judge Lipscomb's letter, but that it had not persuaded her to change her support for the proposed amendment. Judge Dickey stated that he was generally in agreement with Judge Lipscomb's letter, and was strongly opposed to this proposal because he thought it would only worsen whatever conflicts might arise and would also make settlements more difficult to obtain. Judge Marcus stated that he favored the proposal because it would remove the coercive effect of the current 54 E on attorney fees.

Consideration of this item concluded with consensus that it merited further discussion at the August and September meetings of the Council.

3E. ORCP 44/55 (see Attachment 3E to agenda of this meeting) (Mr. Gaylord). Mr. Gaylord referred to his 7-10-00 letter to Mr. Alexander reporting on the outcome of a meeting at his office on 7-5-00 with representatives of groups having an interest in this matter (Mr. Mark Clarke representing OADC and participating by phone, Mr. Tom Cooney representing the Oregon Medical Association, and Ms. Gwen Dayton representing the Oregon Hospital Association). He invited members' attention in particular to the five "Resolutions" on pp. 6-7 of the aforementioned letter. He added that each Resolution represented an effort to achieve a balanced solution to one of the principal difficulties or points of contention which have arisen in the course of the subcommittee's efforts. He further added that he would like to use this opportunity to obtain some reactions of Council members to these Resolutions, to guide the subcommittee as it tries to bring this endeavor to a successful conclusion. Mr. Gaylord then summarized each Resolution in turn.

Mr. Alexander asked the members if anyone favored simply dropping this project entirely, to which no one responded. He then asked that all members take the time between now and the August 12 Council meeting to study all the materials relating to ORCP 44/55 carefully, and come to that meeting with the best thoughts and suggestions they possibly can. He added that, with all the laborious efforts already expended by the subcommittee, the time had come when all Council members should engage themselves closely in the final efforts to achieve the best possible solution to these vexing issues.

Agenda Item 4: Old business Justice Durham referred members to his letter to Mr. Alexander dated 6-30-00 enclosing a draft amendment to ORS 1.757(2) prepared by him and Judge Harris and intended to deal with the difficulty the Council has experienced because of the "exact language" requirement of that subsection. He recalled for members the nature of that difficulty, namely, that it effectively deprives the Council of much of the benefit of the comment period which proceeds December meetings at which votes are taken on whether to finally promulgate ORCP amendments.

He explained that the proposed statutory amendment would give the Council some flexibility by allowing it to make useful revisions in light of any comments received in response to the publication of tentatively adopted ORCP amendments in the October judicial advance sheets, but would require that any modifications the Council wished to make in ORCP amendments must be promptly published to the Bar and specific notification given to the Legislative Assembly in the letter by which it formally reports finally promulgated ORCP amendments to that body.

Mr. Gaylord stated that he would be more inclined to support this proposal if its language were changed to clarify that only technical or stylistic modifications could be made to ORCP amendments as published in the October judicial advance sheets. Justice Durham responded that Judge Harris and he had not been able to devise language that would distinguish between technical or stylistic changes with sufficient clarity to avoid confronting the Council with problems at December meetings. He added that he thought the requirement of at least 15 votes to promulgate amendments provided a sufficient safeguard against any effort, which he said he regarded as highly unlikely, to misuse the greater flexibility this amendment would afford.

Judge Carp said he thought the deadline had passed for getting legislative proposals to the OSB for its sponsorship in the 2001 session, but urged that the assistance of Bob Oleson and Susan Evans Grabe be requested.

Discussion of this item concluded with consensus that this proposal would be voted on at the Council's September 9, 2000 meeting. Mr. Alexander said that, in the meantime, he would contact Mr. Oleson and Ms. Grabe to ask for their assistance.

Agenda Item 5: New business. No item of new business was raised.

Agenda Item 6: Adjournment. On motion duly made, seconded and unanimously agreed to, Mr. Alexander declared the meeting adjourned at 12:30 p.m.

Respectfully submitted,

Maury Holland
Executive Director

Amendments to ORCP 7 D Tentatively Adopted
And Revised at June 10, 2000 Meeting
{Matter to be added in **bold underlined**; to be deleted
[*italicized and enclosed in square brackets*]}

RULE 7. SUMMONS

* * * *

D(2)(d)(ii) Calculation of Time. For the purpose of computing any period of time provided by these rules or by statute, service by mail, except as otherwise provided, shall be complete on the day the defendant**, or other person authorized by appointment or by law,** signs a receipt for the mailing, or three days after the mailing if mailed to an address within the state, or seven days after the mailing if mailed to an address outside [*of*] the state, which first occurs.

* * * *

D(3)(a)(i) Generally. Upon an individual defendant, by personal [*service upon*] **delivery of a true copy of the summons and the complaint to** such defendant or **to** an agent authorized by appointment or law to receive service of summons **on behalf of such defendant** [*or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then*], by substituted service**, or** by office service.[*upon such defendant or agent.*] Service may also be made upon an individual defendant to whom neither subparagraph (ii) nor (iii) of this paragraph applies by mailing made in accordance with paragraph (2)(d) of this section provided the defendant signs a receipt for the certified, registered or express mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.

* * * *

D(4)(a) Actions Arising Out of the Use of Roads, Highways, Streets, **or Premises Open to the Public**; Service by Mail.

D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehilce may be involved while being operated upon the roads, highways, streets**, or premises open to the public as defined by law,** of this state, if the plaintiff makes at least one attempt to serve the defendant who operated such motor vehicle, or caused it to be perated on the defendant's behalf, by a method authorized by subsection (3) of this section except service by mail pursuant to subparagraph (3)(a)(i) of this section and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph (2)(d) of this section addressed to that defendant at:

* * * *

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

* * * *

Amendments to ORCP 21 A Alternatively Proposed by Rule 21 A Subcommittee*--May 12, 2000 (see attached memo).

{{Language to be added **in bold underlined**; to be deleted [*in italics enclosed in square brackets.*]

RULE 21. DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS.

Alternative A**

A. How Presented. * * * When a motion to dismiss has been granted, [*judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25*] **the court may enter judgment in favor of the moving party or, if the dismissal is for defense (3) or the court has given leave to file an amended pleading under Rule 25, may defer entry of judgment pursuant to subsection B(3) of Rule 54.**

Per Judge Linder 7-19-00

Alternative B would add a new section H to Rule 21 as follows:

* * * *

H. Stay of Proceeding. Notwithstanding any other provision of this rule, should it appear to the court at any point in the proceedings, by motion or otherwise, that a prior action is pending between the same parties for the same cause, the court may in its discretion order that proceedings be stayed or [redacted]

*Judge Linder and Mr. Johnson.

**The Subcommittee prefers Alternative A.

MEMORANDUM

To: Council on Court Procedures
From: The Subcommittee (Johnson, Linder) on ORCP 21 A(3)
Re: Recommended Amendment to the Rule
Date: May 12, 2000

A. *Background: the problem.*

Under ORCP 21 A(3), a defendant may move to dismiss an action based on the fact that there is "another action pending between the same parties for the same cause ." The rule further provides that "[w]hen the motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25." The potential problem is that the prior action may have an outcome that does not resolve the issues, at which point the plaintiff should be free to refile. By that time, however, the court may have lost jurisdiction. As Maury Holland hypothesized:

> "21 A(3) contains the admittedly remote, yet real, potential for causing serious injustice. Suppose, for example, that A sues B in an Oregon circuit court. B then moves for dismissal of that action on the ground that A is a member of the plaintiff class in a class action pending in some other court in the United States. The judge, pursuant to A(3), grants B's motion to dismiss. Some time later the class in the other action is decertified, or the other action is disposed on some procedural ground not going to the merits. A then re-commences his action against B. While the previous dismissal in the Oregon court pursuant to A(3) would have been without prejudice, the pertinent statute of limitations might well have run and A's claim against B thus become time-barred."

Weller v. Weller, 164 Or App 25, 988 P2d 921 (1999), provides the only reported instance of the problem coming to pass. There, wife filed a dissolution action in Oregon. Husband, in a race to the courthouse, had previously filed for dissolution in Idaho. The Oregon court dismissed without prejudice. The Idaho judgment was then entered. Idaho did not have personal jurisdiction over wife, so it could not adjudicate property and support issues. Wife refiled in Oregon, seeking (as relevant to our concern here) a division of personal property based on husband's enhanced earning capacity. The Court of Appeals agreed with husband that Oregon lacked subject matter jurisdiction to make that property division because, under the pertinent statutes, the court must do so as relief ancillary to a judgment of dissolution. By the time of the refiling in Oregon, the parties were no longer married and the action was not one for dissolution.

A. Possible solutions

1. *Do Nothing.*

As written, the rule makes entry of a judgment in favor of the moving party mandatory "unless the court gives leave to file an amended pleading * * *." At least

arguably, the harsh result in *Weller* would be avoided by that course. The case would simply remain pending and would be reactived by the filing of the amended petition. In effect, that action serves to stay the case.

The downside of that is that the rule's current language makes that solution obscure, both to courts and to the parties. Also, requiring an "amended pleading" is artificial because the problem is not in the contents of a plaintiff's pleading, but in the timing of the proceeding.

2. *Amend ORCP 21 (A) to give the court discretion to defer entry of judgment when the dismissal is on this ground.*

The rule could be amended as follows:

"When a motion to dismiss has been granted, ~~judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25~~ **the court may enter judgment in favor of the moving party or, if the dismissal is for defense (3) or the court has given leave to file an amended pleading under Rule 25, may defer entry of judgment pursuant to Rule 54B(3).**

The amendment provides that the court "may" enter judgment (rather than "shall" do so) after granting the motion to dismiss, thus emphasizing and making express that the court has discretion at that point. By cross-referencing Rule 54 B(3), the amendment permits the court to defer entry of the judgment on the same terms ("for good cause shown") as would justify deferring entry of judgment for inactivity in the case. The net effect would be to stay the case.

3. *Amend the rule as per Maury Holland's proposal in the February 12, 2000 agenda.*

Maury suggested deleting all references in section A to the defensive assertion of the fact of a prior action pending, and creating a new section H, which would provide:

H. Notwithstanding any other provision of this rule, should it appear to the court at any point in the proceedings, by motion or otherwise, that a prior action is pending between the same parties for the same cause, the court may in its discretion order that proceedings be stayed pending disposition of the prior action.

The subcommittee sees a couple of problems with that proposed amendment. First, it may be a bigger break from current practice (raising the matter as a defense, pursuant to the pleading practices and procedures described in A) than is necessary. The rule provides no guidance on when or how to raise the prior action issue, nor how to establish the existence of the prior action. Also, although staying the action is purely discretionary, no other options are identified. Can the court still dismiss the action on this basis? Or does the elimination of that ground from section A suggest a dismissal would no longer be among the appropriate dispositions? It would seem that, in nine

cases out of ten, a dismissal remains sound, given the rarity of the problem. If that is so, it may be better to fix the problem by broadening the options available under current section A, rather than giving the impression that the usual case should be stayed.

A. The Subcommittee's Bottom Line

We favor the second proposed solution, which would be to amend section A itself. The particular amendment that we have proposed may require some refinement. But we think it--or something close to it--will provide a solution without changing current practice more than necessary.

CIRCUIT COURT OF OREGON
Fifteenth Judicial District

RICHARD L. BARRON
Judge

Coos County Courthouse
Coquille, Oregon 97423
396-3121

May 15, 2000

To: Members, Council on Court Procedures

From: Rick Barron

Re: ORCP 22C(1)

Ben Bloom, Bill Gaylord, and I were assigned to a subcommittee to look at possible changes to the above rule. In a memo last October Maury Holland raised three issues regarding the rule. They are: (1) the 90 day period in which a defendant has to file a third party complaint; (2) the requirement that after the 90-day period the defendant must obtain leave of court even if the plaintiff agrees to the filing of a third party complaint; and (3) a defendant cannot file a third party complaint against a third party if the third party is liable to the plaintiff, but not liable to the defendant.

The subcommittee does not recommend changing the part of the rule allowing a defendant 90 days in which to file a third party complaint as a matter of right. The 90-day period is a reasonable time to allow a defendant to decide whether to file a third party complaint.

The subcommittee did discuss possible changes to the requirement that a defendant obtain both agreement of the parties who have appeared and the court after the 90-day period. The possible changes are numbered 1b and 1c, 2 b and 2c, and 3b and 3c in the attached versions of ORCP 22C(1). Each version also has the possible changes to address the third issue raised in Maury's memo. The consensus of the subcommittee is that no change should be made to the requirement that a defendant must obtain both agreement of the parties who have appeared and the court before filing a third party complaint after the 90-day period. It was felt that the court should not be able to allow the filing of a third party complaint if plaintiff opposed the filing after the 90-day period.

The third issue raised by Maury's memo needs a short explanation. A lawyer told Maury that his client, the defendant, had filed a third party complaint against a party who the defendant felt was liable to the plaintiff. The defendant/third party plaintiff did not allege the third party defendant was or might be liable to the defendant/third party plaintiff as required by ORCP 22C(1). The third party defendant filed a motion to dismiss the third party complaint because it did not allege the third party defendant was or might be liable to the defendant/third party

plaintiff and the court allowed the motion. The lawyer was upset because ORS 18.470(2) appears to allow the trier of fact to compare the fault of any person who may have caused damage to the plaintiff. ORS 18.470(2) is set forth in attachment number 4.

The subcommittee recommends that the third issue raised by Maury's memo be discussed. The possible changes are set forth in the attached versions number 1a, 2a, and 3a with no other proposed changes included. Other than placement of the words, there is really no difference between 1a and 2a. All versions would allow a defendant under ORCP 22C(1) to implead a third party who is independently, but concurrently liable to plaintiff, but not liable to the defendant. As such, the lawyer who called Maury would be allowed to implead the third party and not be subject to a motion to dismiss. There are two questions. First, did the legislature intend to expand the definirion of third party defendants beyond ORCP 22C to include independent, but concurrent tortfeasors when it enacted ORS 18.470(2)? Second, does the Council want to allow a defendant to implead a person who is liable to plaintiff, but not the defendant?

ORCP 22C(1)

After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the **plaintiff or to the** third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

ORCP 22C(1)

After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the **plaintiff or to the** third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared [*and*] **or** leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

ORCP 22C(1)

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ORS 18.470(2)

The trier of fact shall compare the fault of the claimant with the fault of any party against whom recover is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled. The failure of a claimant to make a direct claim against a third party defendant does not affect the requirement that the fault of the third party defendant be considered by the trier of fact under this subsection. Except for persons who have settled with the claimant, there shall be no comparison of fault with any person:

(a) Who is immune from liability to the claimant;

(b) Who is not subject to the jurisdiction of the court;

(c) Who is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose.

ROBERT D. DURHAM
ASSOCIATE JUSTICE

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OREGON SUPREME COURT

June 30, 2000

Mr. J. Michael Alexander
Burt Swanson Lathen, et al
388 State Street, Suite 1000
Salem, OR 97301

Re: ORS 1.735(2) (the "exact language" requirement)

Dear Mick:

I wish to bring to your attention an item of Council business that is not listed in your letter of June 13, 2000, but probably merits some discussion at a future Council meeting.

Judge Daniel Harris and I have developed the enclosed amendment to ORS 1.735(2) to alleviate the problems that presently surround the "exact language" requirement in ORS 1.735(2). Judge Harris and I are in agreement regarding this proposed amendment. The amendment, if adopted by the legislature, would permit the Council to amend a proposal at its final meeting and require a notification of the changed wording to members of the Bar, within 60 days, and to the legislature when the Council submits its final rule amendments.

Because this proposal concerns an amendment to a statute, not a rule of civil procedure, the promulgation rules and deadlines that govern rules of civil procedure do not apply. Instead, legislative approval will depend on advocacy for the amendment by Council leaders and representatives. It is obvious to me that the Council should reach a strong consensus view with respect to any statutory amendment that the Council might propose on this subject.

Yours truly,

Robert D. Durham

ROBERT D. DURHAM
Associate Justice

RDD:lk
Enclosure
cc: Professor Maury Holland
Hon. Daniel Harris

1.735. Rules of procedure; limitation on scope and substance; submission of rules to members of bar and Legislative Assembly.

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

(2) A promulgation, amendment or repeal of a rule by the council is invalid and does not become effective unless the **council does the following:**

(a) The council shall publish or distribute the exact language of the proposed promulgation, modification or repeal to all members of the bar at least 30 days before the meeting at which the council plans to take final action on the promulgation,

modification or repeal, and

(b) If the council modifies a proposed promulgation, modification, or repeal of a rule at the meeting described in subsection (2)(a) of this section, the council shall publish or distribute a notification of the modification to all members of the bar within 60 days after the meeting and to the Legislative Assembly when the council submits the proposed promulgation, amendment or repeal of a rule to the Legislative Assembly pursuant to subsection (1) of this section.

Amendments to ORCP 44 A and 46 B(2)(e) Proposed
By the IME Subcommittee*
(June 1, 2000)

[Matter to be added in **bold underlined**]

RULE 44. PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

A. Order for Examination. When the mental or physical condition or the blood relationship of a party, or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. **Unless the trial court requires other or different conditions for good cause supported by the record, the following conditions shall apply to a compelled medical examination under this rule:**

A(1) (italicized catch line needed here--MJH) **The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.**

A(2) (italicized catch line needed here--MJH) **The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedure followed during the examination are reserved for trial or other**

*Justice Durham, Chair; Ms. Clarke, Mr. Gaylord, and Mr. Spooner.

disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges. No person may obstruct the examination.

A(3) (italicized catch line needed here--MJH) Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(4) (italicized catch line needed here--MJH) Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

B. Report of Examining Physician or Psychologist.

* * * *

RULE 46. FAILURE TO MAKE DISCOVERY; SANCTIONS

* * * *

B. Failure to comply with order.

* * * *

B(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under [1]Rule

44 A[1] requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where a party, the examinee, or a representative has violated an agreed condition or has obstructed an examination under [1]Rule 44 A.[1]

* * * *

[1]---[1]"Rule 44 A" should be corrected to: "section A of Rule 44."

ROBERT D. DURHAM
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OREGON SUPREME COURT
June 1, 2000

Mr. J. Michael Alexander
Burt Swanson Lathen, et al
388 State Street, Suite 1000
Salem, OR 97301

Re: Compelled Medical Examinations
(ORCP 44 A, 46 B(2)(e))

Dear Mick:

The Council's Subcommittee on Compelled Medical Examinations (Ms. Kathryn Clarke, Mr. Ralph Spooner, and me) has completed its work and unanimously recommends adoption of the amendments reflected in the accompanying draft headed "Final Amendments as of June 1, 2000."

The recommended amendments would add new material to ORCP 44 A, regarding compelled medical examination procedures, and to ORCP 46 B (2)(e), regarding sanctions for violation of an agreed condition or obstruction of an examination under ORCP 44 A.

The Council owes a debt of thanks to Kathryn and Ralph for their hard work and ingenuity in developing a workable solution to a thorny problem.

I am forwarding a copy of this letter and enclosure to Prof. Maury Holland for his use in organizing the Council's discussion of this topic, and to Mr. Bill Gaylord, who also is working with a subcommittee on other possible amendments to ORCP 44.

Please call me if you have any questions.

Yours truly,

Robert D. Durham

ROBERT D. DURHAM
Associate Justice

RDD:lk
Enclosure
cc: Ms. Kathryn H. Clarke
Mr. Ralph C. Spooner
Professor Maury Holland (via mail and fax)
Mr. William Gaylord

Gary A. Rankin

Attorney at Law
ADMITTED IN OREGON AND WASHINGTON
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March 20, 2000

Hon. Janice R. Wilson
Multnomah County Courthouse
1021 SW 4th Ave
Portland, OR 97204

RE: Motion Panel - Defense Examinations

Dear Judge Wilson:

I understand that there is some effort being made by plaintiff's bar to "fix" the current way defense medical examinations are conducted. I have recently received a flurry of objections from the plaintiff's bar in response to my attempts to schedule defense medical examinations on personal injury lawsuits. A typical example of this is set forth in the letter, attached; the results of this attempt to "chill" the medical examination is also shown in one of the more recent defense medical examinations which was conducted at my request.

I would suggest to the Motion Panel that, in fact, the traditional procedure in Oregon for defense medical examinations is not broken and nothing needs to be "fixed" in spite of the push by the plaintiff's bar to paint defense medical examinations as a chamber of horrors.

I have had the opportunity of reviewing Mr. Walter Sweek's letter to you and I agree that there are health care providers on both sides of a lawsuit who are zealous advocates for their client's positions. On the defense side, such an advocate is open to extensive cross examination as to that doctor's potential bias and prejudice. With the advent of new technology I have found that the plaintiff's bar has immediate internet access and can draw upon the resources of all plaintiff's attorney who have come into contact with any specific defense doctor.

In addition, the plaintiff can also testify and bring to the jury's attention any real or imagined abuse which may have occurred during the defense medical examination. In spite of anecdotal horror stories, from my personal observation and practice, defense examinations do, in their current form, generate settlements and resolution of disputes.

I would be happy to provide to the Panel a list of lawsuits which I have handled, in which the defense examination prompted, and was solely responsible for, payment of policy limits and/or settlements in line with plaintiff's evaluations.

Again, in spite of the recent vigorous attack by the plaintiff's bar to stifle any chance that the defense has in reviewing personal injury claims by any medical authority outside of those doctors chosen by the plaintiff, the fact remains that defense examinations do foster settlements of personal injury claims. The process may not be perfect, but I would suggest that the Motion Panel go slowly and get input from the entire bar before fundamental changes in defense medical examinations take place within the Multnomah County Motion Panel.

Very Truly Yours,

GARY A. RANKIN
Attorney at Law

1. Mr. [redacted] will not fill out "intake forms" or other documents for the DME. If the examining physician wants any written materials to be completed, they must be sent to me in advance.

2. There will be no x-rays or other invasive diagnostic procedures on the day of the examination. If the examining doctor wants such testing, I will need to know the reason and will want to discuss with [redacted] treating physician whether existing testing will suffice.

3. There will be no administration of any psychological testing instruments without my prior approval.

4. There will be no physical capacity evaluation performed at the DME.

5. There will be no questions regarding the attorney, client relationship I have with Mr. [redacted] or anything that he and I have discussed, or any discussion about the facts of the accident. If the physician needs a statement about the mechanism of injury in order to evaluate [redacted]'s injuries, I will provide one, or you may take [redacted] deposition and provide that to the doctor.

6. [redacted] will be permitted to wear his street clothes until it is necessary for him to remove his shirt for examination of his shoulder.

7. [redacted] will be permitted to have his wife present at the exam, so long as she does not interfere with the examination.

8. No "oral history" will be taken at the examination. If the examining physician needs a history, you may, of course, take [redacted] deposition and provide that or any other discovery documents to the doctor.

9. There will be no unnecessary physical pain during the examination, and no insinuations or derogatory comments regarding [redacted] injuries, state of mind, recovery, etc.

Please review this and let me know where you stand regarding consent to these provisions.

February 24, 2000

DISCUSSION:

Mr. [redacted] would not allow me to perform a neck examination or complete neurological examination. His left shoulder examination suggested some increased laxity on the left compared to the right.

At the beginning of this examination Mr. [redacted] spoke with his attorney. When he returned, he refused to give me any history whatsoever regarding the details of the accident except describing the "makes" of vehicles involved in the accident. Because Mr [redacted] apparently on the advice of his attorney, refused to give me any in-depth history and, in fact, any history regarding what actually happened to him at the time of the accident (for example, he refused to state whether he struck any portion of his body on the interior of his vehicle), I have only the chart records for review. Purely based on these records, [redacted] did not initially complain of any pain in his left shoulder when reviewed at the [redacted] Urgent Care Facility or when he initially treated with Dr. [redacted] He also was observed initially to have a full range of motion in his left shoulder, and on April 9, 1999, his shoulder examination was described as normal. Other than mild left interscapular tenderness, the records do not suggest any initial injury to the left shoulder. I did not have Dr. [redacted] records for review. Perhaps these would be helpful.

No further comments can be made at this time.

Respectfully submitted,

OADC Oregon Association of Defense Counsel

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July 7, 2000

The Honorable Robert D. Durham
Justice Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem, OR 97310

Re: *Council on Court Procedures Subcommittee, ORCP 44 Medical Examinations*

Dear Justice Durham:

The Oregon Association of Defense Counsel offers the following comments regarding proposed changes to ORCP 44 related to independent medical exams. It is our understanding that the Council on Court Procedures is examining the procedures to be followed in conducting independent medical exams.

ORCP 44 IMEs provide the defendant with a "second opinion" regarding the medical condition of a plaintiff. This is the only method available to defendants to evaluate a plaintiff's medical condition prior to trial. Moreover, it is usually the only part of the medical evaluation process not under the plaintiff's exclusive control. There are no particular rules identified for the examination of plaintiffs. However, it is apparent that the exam is intended to enable defendant to have a fair opportunity to appraise the plaintiff's condition.

It is important to note that physicians who are called to testify for plaintiffs are often not merely "treating" physicians, but also include doctors referred or hired by plaintiff's counsel for the purpose of litigation. Defendants have no opportunity to attend or record what occurs in these examinations nor even to depose the plaintiff's litigation-related doctors. We accept this disadvantage but necessarily must rely upon the IME in order to obtain our independent medical evaluation of plaintiff.

It is also important to recognize that defendants do not request IMEs in every case. Many defense lawyers do not seek IMEs if, for example, plaintiff's injuries are clear, or are readily understood, or when the seriousness of the injury is not in dispute, or if plaintiff's treating physicians are highly regarded in their field. Because the defendant must furnish the IME report to plaintiff's counsel, it is counterproductive to seek an IME when it is likely to do nothing more than substantiate what we already

Attachment 3E-11 to
8-12-00 Agenda

know about plaintiff's injury. But there are other cases in which the injury may be suspect or exaggerated, or in which the doctor's analysis or objectivity is subject to serious doubt. To fairly evaluate the injuries for which plaintiff claims damages in these cases, our clients ought to be entitled to the same opportunity to have a physician examine the plaintiff as that allowed plaintiff's physicians.

Unfortunately, in recent years this fundamental need has been threatened by the attempts of some plaintiffs' lawyers to convert IME exams into an adversarial process. These efforts include the following:

1. Demanding that plaintiff's attorney be present during the defense IME.

2. Audio or videotaping the IME without advance permission of the medical examiner.

3. Precluding the independent medical examiner from taking an oral history from the patient, thereby forcing the examiner to rely upon a history from prior medical records, deposition testimony or conversations with the defense attorney.

4. Preventing the independent medical examiner from asking questions regarding the plaintiff's emotional and mental history.

5. Restricting the examination to the body part for which injury is claimed in the accident.

6. Requiring IME doctors to provide 1099s or other financial information regarding income earned from other IMEs.

7. Objecting to questions asked or procedures used during the exam.

These efforts are contrary to the spirit of ORCP 44 and the concept of IMEs. They are also one-sided. Defendant has none of these rights when a plaintiff is examined by doctors retained by plaintiff.

Recently, the Multnomah County Motions Panel revoked its ruling on the same topic. The prior Motions Panel rulings made it clear that (1) plaintiff's counsel may not attend an IME; (2) the examination cannot be recorded or memorialized in any way

other than through the report required by ORCP 44B; and (3) vocational rehabilitation exams will not be authorized unless performed as part of an ORCP 44 IME by a physician or psychologist. It is our understanding that the Panel did not revoke the prior ruling because it was erroneous, but because the Council was going to address the issue by rule.

The OADC strongly supports amending ORCP 44 to safeguard the sanctity of independent medical exams. These amendments should include the protections afforded by the prior Multnomah County Motions Panel rulings.

OADC is concerned that participation by the plaintiff's lawyer will prevent defendants from obtaining independent medical exams. Physicians will not want to participate in IMEs if the examination is disrupted by persons advocating on plaintiff's behalf. Doctors who perform IMEs will not want to put up with overly restrictive or adversarial procedures to conduct an exam. The already limited number of doctors available to do these exams will be reduced or eliminated. This would severely limit the ability of defendants to defend themselves.

Furthermore efforts to allow advocates into the IME process will place a heavy burden on the trial courts. Specifically, the trial court will need to rule on the following:

1. What, if anything, may the plaintiff's attorney or plaintiff's representative say or do during the examination? Can the representative supply information to the doctor? Can the representative speak at all?

2. If the exam is recorded by audiotape, who retains the "official" tape for replay in front of the jury? Will a copy of the tape be provided to the defense attorney? Does a court reporter or other certified videographer need to retain a copy to ensure that there is no alteration or editing?

3. If the plaintiff's attorney elects to play a portion of the tape to the jury, does the defense have a right to have the entire tape played to the jury? Will this create an unnecessary expense for trial and add additional time to trial presentation?

4. Is the plaintiff's attorney or representative who appears at the examination subject to discovery in a deposition? Can the

plaintiff's attorney attending the exam testify or be called as a witness? Does this violate DR5-102?

5. How would these limitations affect the rights of insurers under the PIP statutes or under the terms of an insurer's contract?

6. If the plaintiff's attorney raises objections during the IME, who will represent the doctor? Does the doctor need to retain independent counsel in order to complete the exam?

OADC appreciates the efforts of the Council in addressing these concerns. The IME subcommittee has a difficult task to develop rules fair to the parties. With this in mind, we believe the proposed amendments to ORCP 44 recently submitted to the Council create several problems.

First, the plaintiff's attorney or representative should not be allowed to attend the exam. For an attorney, this may create an ethical problem if the attorney becomes a witness. DR 5-102. Anyone else attending the exam may also become a witness subject to a discovery deposition. There is concern that a plaintiff may use the "witness" to inaccurately describe the exam. This creates a "two against one" situation with the doctor put in a position of defending his conduct. This results in a collateral issue that need not be the subject of trial.

There is no need for a "witness" to attend the exam. If there is concern with the methods employed by the doctor, the exam can be recorded. The parties can stipulate to the method for recording or obtain a court order in the event of disagreement.

Second, videotaping should only be allowed upon court order. A procedure should be established for retaining the original tape and providing a copy to those interested. We believe it would be unfair to both the medical profession and to our clients to adopt a rule which in effect presumes unprofessional conduct by a physician. The Council should seek the views of the Oregon Medical Association before adopting any amendments to the rules which place an undue burden on the examiner and which are at odds with the normal and customary methods of forensic medical examination and which would discourage physicians from assisting the legal profession in this kind of necessary activity. We believe that the medical profession already has ethical constraints which protect the public from inappropriate activity by any physician and which provide redress in the unusual case in which a physician treats a patient in an inappropriate manner.

Third, objections regarding the time, place, manner of recording or objections to questions asked should be made before the exam takes place. If the objection is not made, it is waived. If the objection is based on an issue that could not be anticipated before the exam, it is preserved for later resolution. However, if it could have been made before the IME begins, it must be made or is waived.

The proposed amendment reserves all objections until after the exam is completed. This could unfairly impact use of the exam at trial. For example, plaintiffs' attorneys have recently been objecting to any questions by the doctor about prior medical history. If this objection is reserved until trial, the IME doctor can be sandbagged. If the doctor asks about prior history and the court later rules that this objection is well taken, the exam results may be inadmissible. For this reason, objections need to be decided before the exam takes place so that the doctor has an opportunity to cure the error. ORCP 36C already provides an avenue to address such concerns in advance of a requested IME.

OADC believes that any amendments to ORCP 44 should be framed to keep advocates out of the exam. The independent medical examiner should have the same opportunity to examine the plaintiff as that provided to the treating physician.

If you would like further input on this issue, please let me know. Thank you for allowing us to participate in this process.

Sincerely,

Jonathan M. Hoffman
President OADC

JMH:cst
cc: Maury Holland, Executive Director, Council on Court Procedures
Michael J. Alexander, Chairman, Council on Court Procedures

MEMORANDUM

DATE: July 12, 2000

TO Janice Wilson, Chair
Multnomah County Circuit Court Motion Panel

FROM: Robert W. Redding,
Circuit Judge

RE : Defense Medical Examinations - Monitoring

At the CPC II committee meeting July 10 we discussed the number of motions being filed on this issue and the differing judicial rulings resulting in inconsistency and the unproductive use of attorney and judicial time. The committee recognized that the attempt at a motion panel consensus ruling had created an uproar, but felt that there should be an approach to this issue other than simply differing ad hoc rulings.

Members of this committee felt a solution might be to have the presiding judge appoint three judges to hear all of these motions, either dividing the motions among themselves or hearing all of the motions together as a three judge panel. Perhaps you have other ideas on a possible solution, or think the present situation acceptable. Would you consider taking this issue up with the motion panel?

RWR/dlm

D:\wpdoc\Cpc.com\memo to Judge Wilson re motion panel

CIRCUIT COURT OF THE STATE OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
PORTLAND, OR 97204-1123

JANICE R. WILSON
JUDGE

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May 26, 2000

Corbett Gordon
Heidi Guettler
Richard R. Meneghello
Russell S. Collins
Kenneth Piumarta
Corbett Gordon & Associates, P.C.
1001 SW Fifth Ave., Suite 1600
Portland, OR 97204

Re: Motion Panel "Rulings" and ORCP 44 Examinations

Dear Counsel:

Thank you for your recent letter concerning the report in the last issue of *The Multnomah Lawyer* and activities of the Motion Panel.

Unfortunately, the statement in *The Multnomah Lawyer* was a bit inartfully worded. The Motion Panel has abandoned the use of the word "rulings" to describe its consensus statements because it added to the confusion among members of the bar about what the panel is and what it does. The Motion Panel is simply that group of judges in Multnomah County who have volunteered to hear civil motions. We get together from time to time (in the last couple of years it has been on a more regular monthly basis) to have lunch together and discuss what kinds of things are coming up in motion practice.

Some of you may recall that when Charles Crookham was our presiding judge he heard all of the civil motions himself. This led to a great deal of predictability about how certain types of motions were likely to be ruled on. In several matters the bar recognized there was a "Crookham rule" that was likely to govern. When Donald Londer became the presiding judge he shared the responsibility for civil motions with other judges. This was perceived as creating some uncertainty in the bar about how motions would be ruled on. In an effort to return some predictability, the motion judges decided to publish to the bar a list of the "Crookham rules" that still reflected the rulings of motion judges, as well as other statements about how the judges were ruling on common motions. Where there was no consensus among the judges, no statement of consensus or "ruling" was published and the outcome of a motion was likely to depend on the judge assigned the hearing.

Every iteration of the published "rulings" or consensus statements also contained a caveat that no judge was bound in any particular case to rule a certain way. Parties were always free to make their motions and persuade the judge that the case called for a different outcome than had historically been the case. Nevertheless, we thought the information was useful to the bar in assessing the likelihood of success on a given motion and in undertaking a cost-benefit analysis. Unfortunately, some members of the bar took these consensus statements to mean more. Some attorneys were requesting sanctions against a party for making a motion when the motion panel had published a "ruling" against that position.

Some attorneys also seemed to think that the motion panel, *acting as a group*, could change the "ruling" for future cases. The Motion Panel shares some responsibility for this misapprehension. In the past we have allowed or even sought input from the bar when there was some controversy about our consensus statements or an individual judge's ruling in a particular case. That practice was probably not appropriate. The judges of the Motion Panel have never intended to adopt rules with the force of law stating how they will rule on a particular motion in a future case, and it would probably be a violation of the Code of Judicial Conduct for them to do so.

As a result of all this confusion, the Motion Panel agreed to publish "consensus statements" and delete the word "rulings." We have also rewritten them in the past tense so it is clear that they are a recital of history, not a statement of future intent. (We assume that to the extent the past is often a good predictor of the future, these statements will still have the same utility to the bar as always.)

In our Motion Panel meetings we sometimes discover that a position we had all taken historically (and published) is no longer good law because of an appellate decision. We sometimes also discover there is no longer a consensus among us on certain motion issues. This can happen either because of a change in the composition of the panel or because one or more judges have simply found that their rulings in actual cases more often than not do not conform to the statement of consensus. When any of those events occur, we simply withdraw our consensus statement because it no longer has any predictive value.

The Motion Panel has withdrawn its consensus statement on attendance of third parties and recording of ORCP 44 examinations because it no longer reflects the consensus of the panel members and the matter has been taken up by the Council on Court Procedures. This does *not* mean that the converse of the old statement is the new consensus. All it means is that the outcome of a motion on these issues will depend on which judge hears it.

I am forwarding your letter to Judge Marcus, who has undertaken responsibility for taking all the correspondence we have received from the bar on ORCP 44 examinations to the Council on Court Procedures.

Sincerely,

Janice R. Wilson

cc: Hon. Michael H. Marcus w/enc ✓

Attachment 3E-18 to
8-12-00 Agenda

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May 17, 2000

The Honorable Janice R. Wilson
Multnomah County Circuit Court
1021 S. W. Fourth Avenue
Portland, OR 97204

Re: *Motion Panel Rulings*

Dear Judge Wilson:

We read in the last issue of *The Multnomah Lawyer* that you will be considering several of the positions the Motions Panel currently holds. Specifically, we read that you were considering reversing the rule that prohibits plaintiffs' counsel from being present during Independent Medical Examinations/Independent Psychological Examinations (IMEs/IPEs) pursuant to ORCP 44. We write to you as a firm that frequently works with psychiatrists and psychologists who perform IPEs.

We strongly oppose any rule that would allow attorneys to be present during an IPE. In the psychiatric/psychological context, many doctors have informed us that the presence of a third party in an examination will invalidate an examination. By having an advocate present at an examination or having an examination recorded, we are advised that the person being examined will often alter his or her answers and thereby provide inaccurate responses. We are told it inhibits the establishment of a doctor/patient relationship conducive to honest communication in the examination process. The strong opinion against audiotaping psychological or psychiatric examinations in the psychiatric field is evidence that the validity of an examination is diminished by such an intrusion.

In addition, the presence of a third party or a recording device reduces the examination itself into an adversarial proceeding. There is a considerable amount of case law from various jurisdictions that describe the fact that the medical examination itself is independent and should remain independent. By allowing an attorney to be present during the examination, it could easily lead to the types of disputes and posturing that unfortunately occur during depositions. The examining physicians are

held to a standard of conduct that should prevent them from taking advantage of an individual, and since they are not "representing" either party, there is no need for counsel to be represented by counsel during the hearing. In addition, opposing counsel are provided an opportunity to challenge the conclusions of an examining doctor on cross examination at trial. Allowing audiotape or the presence of an attorney at the IPE will lead to cross examination on specific questions asked at an IPE and decrease the focus on the doctor's opinion. This process will serve to further dilute the litigation process and potentially limit the number mental health professionals willing to provide IPEs.

At the very minimum, we request that the Court not lay down a blanket rule regarding IMEs or IPEs. This is because the examination itself can vary widely depending on if it is a mental examination or a physical examination. Judge Redding denied plaintiff's request to audio tape an IPE recently, noting the difference between these two types of examinations while denying the Motion. He noted that the presence of counsel during an examination might be necessary if one or two words spoken during the examination could drastically alter the results of the examination. For example, he stated that in a chiropractic exam, the statement, "the car was not going very fast," might be a very important statement in the outcome of the entire case. In such a scenario, it might be necessary for an independent recording mechanism or a third party to be present. However, Judge Redding noted that in a mental examination, one or two words will not necessarily sway the examination or control the overall expert opinions of the examining psychiatrist/psychologist.

As a compromise to the current situation, we suggest that the Motion Panel issue a statement informing the Multnomah County legal community either that counsel and/or recording not be allowed at an IPE or that this issue will not be governed by the Motions Panel and should be decided on a case-by-case basis by individual judges. Thank you for your consideration in this regard.

Sincerely,

Corbett Gordon Heidi Guettler Richard R. Meneghello

Russell S. Collins Kenneth Piumarta

DRAFT FOR CONSIDERATION AT 8-12-00 COUNCIL MEETING

Note: Additional new language is bolded; deleted language is italicized and bracketed.

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

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 title and text)

C. Health Care Records.

C(1) ***Definitions.*** **As used in this rule, "health care records" means medical records as defined in ORS 192.525(8), 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**

(Replaced by Drafts A, B and C (see attachment))

copies of all health care records within the scope of discovery under section B of Rule 36 by either

C(2)(a) serving a request for production for such records on the injured party or its legal custodian or guardian pursuant to Rule 43; or

C(2)(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.

C(3) ***Pretrial discovery of health care records directly from health care provider or facility.*** Health care records within the scope of discovery under section B of Rule 36 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 paragraph (2)(b) above, or by the procedures described in section H of Rule 55, Pretrial subpoena of health care records from health care provider or facility.

D. Report; effect of failure to comply.

(delete section entirely)

E. Access to hospital records.

(delete section entirely)

SUBPOENA
RULE 55

(A. through G. unchanged.)

* * * * *

H. [Hospital Records] ***Pretrial subpoena of health care from health care provider or facility***

H(1) [***Hospital.*** *As used in this rule, unless the context requires otherwise, "hospital" means a health care facility defined in ORS 442.015(14)(a) through (d) and licensed under ORS 441.015 through 441.097 and community health programs established*

under ORS 430.610 through 430.695.] ***Definition.*** **For purposes of this section health care records are defined in subsection C(1) of Rule 44.**

NOTE: The prior language in H(2), H(2)(a), H(2)(b), H(2)(c) and H(2)(d) is now contained in H(7) with appropriate changes. THIS INFORMATION SHOULD BE IN A COMMENT AT THE END OF THIS DOCUMENT.

H(2) ***Service of subpoena and authorization.*** **Except when it is provided with a voluntary written consent to release of the health care records pursuant to paragraph (c)(2)(b) of Rule 44, 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 section B of Rule 36 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:**

H(2)(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**

H(2)(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**

(Prior H(2)(c) and H(2)(d) are deleted under this section but appear under new Section 7.) INDICATE UNDER COMMENTS AT THE END OF THIS DOCUMENT.

(Indicate deletion of prior H(3), H(3)(a), H(3)(b) and H(3)(c) in comments at the end of this document.)

H(3) ***Return of service of subpoena and authorization;***

objections. 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:

H(3)(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

H(3)(a)(i) return it to the requesting party for its use in obtaining records directly from the health care provider(s) or facility or facilities,

or

H(3)(a)(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 6 below; and

H(3)(b) as to any part of the SUBPOENA and AUTHORIZATION to which it does object, serve a written objection pursuant to section B of Rule 43 on the party seeking the discovery.

Indicate deletion of prior H(4), H(4(a) and H(4)(b) and H(5).

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

H(5) ***Order limiting disclosure***. Upon serving an objection to part or all of a SUBPOENA and AUTHORIZATION pursuant to paragraph (2)(b) above, the objecting party may seek an order limiting extent of disclosure, pursuant to section C of Rule 36.

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:

H(6)(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:

H(6)(a)(i) (name and address of person whose records are sought, or his or her attorney)

H(6)(a)(ii) (name and address of each other party or his or her attorney who seeks access to the records)

H(6)(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 five (5) days of this date to the person whose records are sought or his or her representative, whose name and address are listed first above. Only _____ (name of person or his or her attorney whose records are sought) is authorized to receive the copies of these records directly from you.

H(6)(c) The STATEMENT OF INSTRUCTIONS shall be signed by the party whose records are sought, or his or her attorney, and a copy served with a certificate of service pursuant to section C of Rule 9 on each party or his or her attorney, seeking discovery of the health care records.

H(7) ***Mode of compliance.*** Health care 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.

H(7)(a) Except as provided in subsection (9) of this section, when a subpoena is served upon a custodian of health care records in an action in which the health care provider is not a party, and the subpoena requires the production of all or part of the records of the health care provider relating to the care or treatment of a patient of the health care provider, it is sufficient compliance therewith if a custodian delivers by mail or otherwise the number of true and correct copies 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 8 of this section. The copies may be photographic or microphotographic reproduction.

H(8) *Affidavit of custodian of records.*

H(8)(a) The records described in this section shall be accompanied by the affidavit of the custodian of the 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 copies are true copies of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the health care provider, in the ordinary course of its business, at or near the time of the act, condition, or event described or referred to therein.

H(8)(b) If the 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) 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) ***Personal attendance of custodian of records may be required.***

H(9)(a) The personal attendance of a custodian of health care provider records and the production of original health care provider records are required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of health care provider records and the production of original records are required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(7) and (8) shall not be deemed sufficient compliance with this subpoena.

H(9)(b) If more than one subpoena duces tecum is served on a custodian of 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) *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.

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 his or her 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 Rule 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) ***Limited waiver of privilege.*** Nothing contained in this section, 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) ***Return or destruction of records.*** Any health care records obtained pursuant to this section 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.

[Note: All of prior 55 I is deleted, though not shown here]

I. [Medical Records.] ***Subpoena of health care records for trial; attendance of custodian with original records at trial***

I(1) ***Subpoena to trial.*** Notwithstanding section H of this rule, 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 fcare records without an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS described in paragraph H(2)(b) of this rule or a STATEMENT OF INSTRUCTIONS described in paragraph H(2)(b) of this rule.

I(1)(a) Except as indicated in subsection (2) of this section, 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 subsection H(8) of this rule. 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) ***Personal attendance of records custodian.*** 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 are required by this subpoena. The procedures authorized by section C of Rule 44 or section H of this rule shall not be deemed sufficient compliance with this subpoena.

* * * * *

Procedures on Saturday, August 12, 2000, Oregon State Bar Center, 5200 S.W. Meadows Road, Lake Oswego, Oregon, commencing at 9:30 a.m. These drafts replace the version attached to the August 12, 2000 agenda.

Encs.

ink has caused. Then perhaps you can word process my red ink into more legible separate alternative drafts for out consideration at the next Council meeting.

Explanation of my drafts:

Draft A is almost unchanged from your work, which I am calling the "subcommittee draft," not because everyone has signed off on everything, but because it represents the last product the subcommittee had before it. The only thing changed is the insertion of the "relating to the injury for which recovery is sought" phrase from existing ORCP 44C in new 44C(2) and new 55H(2) in order to keep the same scope of discovery of medical records as before. This same change has been added to each of the drafts I am returning, on the assumption we have consensus on the Council about keeping this provision, which has not been the subject of any negative comment from constituents to my knowledge.

Draft B is the same as draft A except for several small changes in 55H to restrict the number of copies of the records being packaged and sent to two, one for the party who subpoenas them, and one for the patient's side. This draft is intended to allow the Council to consider this nod to the concerns of medical providers about how many sets of records they would have to prepare. The subcommittee does not support this change, but it has been discussed with the full Council, and might need to be available for possible publication as one alternative.

Draft C is the same as A but with modifications and deletions in H(3) through H (5) to delete the first of the two opportunities for the patient to object to the subpoena, leaving only the

take" as to which of possible parties is meant. The wordiness came from our recognition (both in the existing rule, and in subcommittee discussions) that the party is often technically not the same as the patient, but may be a parent, guardian ad litem, or personal representative of a patient. We also recognized during the early years of the current project that claims for damages are not limited to injury, but may be for "death of a person whose estate is a party." Now I wonder if the whole thing would run as well on fewer words if it read simply:

> Any party against whom a civil action is filed for damages to another party for injuries or death...

My thinking is that even a wrongful death action is a claim for "damages" to a party, in that the PR is said to have suffered the damages of the estate's loss of the decedent. Furthermore, the language added in these drafts (A through C) about "relating to the injury..." prevents this from being any case other than the ones where these records have traditionally been discoverable.

However, if either Judge Marcus' or my suggestions for this clause become at all controversial, they should probably be left as is, lest we start remodeling our house before it is first occupied.

2. I agree with Judge Marcus that H(2)(a) should be modified by replacing "a form of subpoena" with "subpoena."

3. Judge Marcus' concern about H(10) are logical, but I need a reading from the Council about whether we are going to proceed with clause H(10) at all. I learned after we

I noticed several subparts do not have titles. If the rules require them to be named, I would welcome input from the Council or the subcommittee, but have not had time to suggest names yet.

Please let me know if you need additional clarification before preparing these alternatives and this letter for use at the August 12, 2000 meeting. Thanks for all your work getting the subcommittee draft into shape.

Very truly yours,

GAYLORD & EYERMAN, P.C.

William A. Gaylord
WAG:jki
Enclosures
cc: J. Michael Alexander
Lisa Brown
Kathryn S. Chase
Lisa A. Amato
Ralph C. Spooner
Nancy S. Tauman

or for damages to for the death of a person whose estate is a party . . ."

It seems to me that "the party" forces the reader into a double take every time, and that the reader must look in vain for some qualifier to make the concept easier to swallow. I think replacing the phrase with "another party" (and probably replacing "control of a party" with "control of another party") would make this whole thing a lot easier.

Second, I'd drop the obtuse language "a form of subpoena" in H(2)(a) with "subpoena."

Third, I'd reword proposed H(10) to make it clear that "in the absence of personal attendance by the custodian" does not qualify the limit itself. In other words, a reasonable fee shall not exceed 25¢ per page whether or not the custodian attends; if the custodian does not attend, any witness fee should be subtracted from the copying fee. The present form creates the ambiguity that the 25¢ limit itself may apply only when the custodian does not attend.

Fourth, I'd make it clear in H(12) whether the "waiver" which this language contemplates for records whose disclosure *is* authorized does or does not extend to admissibility at trial -- *i.e.*, whether or not the waiver contemplated is limited to discovery.

Thanks for your hard work. I hope this input helps.

Sincerely,

Michael H. Marcus

(text unchanged)

B. Report of examining physician or psychologist.

(text unchanged)

C. Reports of examinations; claims for damages for injuries.

(delete title and text)

C. Health Care Records.

C(1) *Definitions.* As used in this rule, "health care records" means medical records as defined in ORS 192.525(8), 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

Draft "A"

D. Report; effect of failure to comply.

(delete section entirely)

E. Access to hospital records.

(delete section entirely)

SUBPOENA
RULE 55

(A. through G. unchanged.)

* * * * *

H. [Hospital Records] ***Pretrial subpoena of health care from health care provider or facility***

H(1) [***Hospital.*** *As used in this rule, unless the context requires otherwise, "hospital" means a health care facility*

draft "a"

statutory witness fees calculated as for a deposition at the place of business of the custodian of the records, and

H(2)(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**

(Prior H(2)(c) and H(2)(d) are deleted under this section but appear under new Section 7.) INDICATE UNDER COMMENTS AT THE END OF THIS DOCUMENT.

(Indicate deletion of prior H(3), H(3)(a), H(3)(b) and H(3)(c) in

Draft "a"

6 below; and

H(3)(b) as to any part of the SUBPOENA and AUTHORIZATION to which it does object, serve a written objection pursuant to section B of Rule 43 on the party seeking the discovery.

Indicate deletion of prior H(4), H(4(a) and H(4)(b) and H(5).

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

H(5) ***Order limiting disclosure.*** Upon serving an objection to part or all of a SUBPOENA and AUTHORIZATION pursuant to paragraph (2)(b) above, the objecting party may seek an order limiting extent of disclosure, pursuant to section C of Rule 36.

H(6) ***Statement of instructions.*** Along with a SUBPOENA and AUTHORIZATION for health care records directly from a

Draft "a"

whose records are sought or his or her representative, whose name and address are listed first above. Only _____ (name of person or his or her attorney whose records are sought) is authorized to receive the copies of these records directly from you.

H(6)(c) The STATEMENT OF INSTRUCTIONS shall be signed by the party whose records are sought, or his or her attorney, and a copy served with a certificate of service pursuant to section C of Rule 9 on each party or his or her attorney, seeking discovery of the health care records.

H(7) ***Mode of compliance.*** Health care 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

Draft "d"

custodian of the records and has authority to certify records; (ii) that the copies are true copies of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the health care provider, in the ordinary course of its business, at or near the time of the act, condition, or event described or referred to therein.

H(8)(b) If the 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) 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) ***Personal attendance of custodian of records may be required.***

H(9)(a) The personal attendance of a custodian of health care provider records and the production of original health care provider records are required if the

Draft "A"

twenty-five cents ($0.25) per page, less any prepaid witness fee, in the absence of personal attendance by the custodian of the records.

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 his or her 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 Rule 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

Draft "a"

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.

[Note: All of prior 55 I is deleted, though not shown here]

I. [Medical Records.] ***Subpoena of health care records for trial; attendance of custodian with original records at trial***

I(1) ***Subpoena to trial.*** **Notwithstanding section H of this rule, 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 in paragraph H(2)(b) of this rule or a STATEMENT OF INSTRUCTIONS described in paragraph H(2)(b) of this rule.**

I(1)(a) Except as indicated in subsection (2) of this section, it is sufficient compliance with such a

Draft "a"

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 are required by this subpoena. The procedures authorized by section C of Rule 44 or section H of this rule shall not be deemed sufficient compliance with this subpoena.

* * * * *

Draft "a"

(text unchanged)

C. Reports of examinations; claims for damages for injuries.

(delete title and text)

C. Health Care Records.

C(1) *Definitions.* As used in this rule, "health care records" means medical records as defined in ORS 192.525(8), 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 <u>relating to the injury for which recovery is sought</u> within the scope of discovery *

Draft "B"

E. Access to hospital records.

(delete section entirely)

SUBPOENA
RULE 55

(A. through G. unchanged.)

* * * * *

H. [Hospital Records] ***Pretrial subpoena of health care from health care provider or facility***

H(1) [***Hospital.*** *As used in this rule, unless the context requires otherwise, "hospital" means a health care facility defined in ORS 442.015(14)(a) through (d) and licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.695.*] ***Definition.*** **For purposes of**

Draft "B"

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

(Prior H(2)(c) and H(2)(d) are deleted under this section but appear under new Section 7.) INDICATE UNDER COMMENTS AT THE END OF THIS DOCUMENT.

(Indicate deletion of prior H(3), H(3)(a), H(3)(b) and H(3)(c) in comments at the end of this document.)

Draft "B"

H(3)(b) as to any part of the SUBPOENA and AUTHORIZATION to which it does object, serve a written objection pursuant to section B of Rule 43 on the party seeking the discovery.

Indicate deletion of prior H(4), H(4(a) and H(4)(b) and H(5).

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

H(5) ***Order limiting disclosure***. Upon serving an objection to part or all of a SUBPOENA and AUTHORIZATION pursuant to paragraph (2)(b) above, the objecting party may seek an order limiting extent of disclosure, pursuant to section C of Rule 36.

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

Draft "B"

above. Only _____ (name of person or his or her attorney whose records are sought) is authorized to receive the copies of these records directly from you.

H(6)(c) The STATEMENT OF INSTRUCTIONS shall be signed by the party whose records are sought, or his or her attorney, and a copy served with a certificate of service pursuant to section C of Rule 9 on [each] the party or his or her attorney, seeking discovery of the health care records. *

H(7) ***Mode of compliance.*** Health care 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

Draft "B"

true copies of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the health care provider, in the ordinary course of its business, at or near the time of the act, condition, or event described or referred to therein.

H(8)(b) If the 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) 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) ***Personal attendance of custodian of records may be required.***

H(9)(a) The personal attendance of a custodian of health care provider records and the production of original health care provider records are required if the subpoena duces tecum contains the following statement:

Draft "B"

custodian of the records.

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 his or her 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] copy of the records on [each] the party seeking them, or shall serve [each] such party with objections to their production pursuant to Rule 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

Draft "B"

either returned to the party whose records they are or destroyed.

[Note: All of prior 55 I is deleted, though not shown here]

I. [Medical Records.] ***Subpoena of health care records for trial; attendance of custodian with original records at trial***

I(1) ***Subpoena to trial.*** **Notwithstanding section H of this rule, 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 in paragraph H(2)(b) of this rule or a STATEMENT OF INSTRUCTIONS described in paragraph H(2)(b) of this rule.**

I(1)(a) Except as indicated in subsection (2) of this section, 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

Draft "B"

the following statement:

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

* * * * *

Draft "B"

(text unchanged)

B. Report of examining physician or psychologist.

(text unchanged)

C. Reports of examinations; claims for damages for injuries.

(delete title and text)

C. Health Care Records.

C(1) *Definitions.* As used in this rule, "health care records" means medical records as defined in ORS 192.525(8), 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

Draft "C"

provider or facility.

D. Report; effect of failure to comply.

(delete section entirely)

E. Access to hospital records.

(delete section entirely)

SUBPOENA
RULE 55

(A. through G. unchanged.)

* * * * *

H. [Hospital Records] ***Pretrial subpoena of health care from health care provider or facility***

H(1) [***Hospital.*** *As used in this rule, unless the context*

Draft "C"

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

H(2)(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

(Prior H(2)(c) and H(2)(d) are deleted under this section but appear under new Section 7.) INDICATE UNDER COMMENTS AT THE END OF THIS DOCUMENT.

Draft "C"

STATEMENT OF INSTRUCTIONS provided in section 6 below; and

~~H(3)(b) as to any part of the SUBPOENA and AUTHORIZATION to which it does object, serve a written objection pursuant to section B of Rule 43 on the party seeking the discovery.~~ *

Indicate deletion of prior H(4), H(4(a) and H(4)(b) and H(5).

H(4) ***Order compelling discovery***. Upon receipt of an objection to all or part of a SUBPOENA and AUTHORIZATION pursuant to paragraph (2)(b) above, or objection to any part of the health care records sent by a provider in response thereto, the party issuing the SUBPOENA and AUTHORIZATION may seek an order compelling discovery, pursuant to Rule 46.

move to H(9)(b) *

~~H(5) *Order limiting disclosure*. Upon serving an objection to part or all of a SUBPOENA and AUTHORIZATION pursuant to paragraph (2)(b) above, the objecting party may seek an order limiting extent of disclosure, pursuant to section C of Rule 30.~~ *

Draft "C"

them together in one package or shipment, and mail that package within five (5) days of this date to the person whose records are sought or his or her representative, whose name and address are listed first above. Only _____ (name of person or his or her attorney whose records are sought) is authorized to receive the copies of these records directly from you.

H(4)(c) The STATEMENT OF INSTRUCTIONS shall be signed by the party whose records are sought, or his or her attorney, and a copy served with a certificate of service pursuant to section C of Rule 9 on each party or his or her attorney, seeking discovery of the health care records.

H(5) ***Mode of compliance.*** Health care 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

Draft "C"

shall be accompanied by the affidavit of the custodian of the 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 copies are true copies of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the health care provider, in the ordinary course of its business, at or near the time of the act, condition, or event described or referred to therein.

H(6)(b) If the 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(6)(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(7) ***Personal attendance of custodian of records may be required.***

Draft "C"

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.

H(1) ***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 his or her 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 Rule 43 B.

H(1)(a) ***Privilege or objection log.*** When a party objects to the provision of health care records otherwise

Draft "C"

H(13) ***Return or destruction of records.*** **Any health care records obtained pursuant to this section 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.**

[Note: All of prior 55 I is deleted, though not shown here]

I. [Medical Records.] ***Subpoena of health care records for trial; attendance of custodian with original records at trial***

I(1) *Subpoena to trial*. Notwithstanding section H of this rule, 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 in paragraph H(2)(b) of this rule or a STATEMENT OF INSTRUCTIONS described in paragraph H(2)(b) of this rule.

Draft "C"

I(2) ***Personal attendance of records custodian.*** 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 are required by this subpoena. The procedures authorized by section C of Rule 44 or section H of this rule shall not be deemed sufficient compliance with this subpoena.

* * * * *

Draft "C"