

corrected

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

Present: J. Michael Alexander Robert D. Durham
 Lisa A. Amato William A. Gaylord
 Richard L. Barron Mark A. Johnson
 Bruce J. Brothers Virginia L. Linder
 Ted Carp Michael H. Marcus
 Kathryn S. Chase Connie E. McKelvey
 Allan H. Coon Karsten H. Rasmussen
 Don A. Dickey

Excused: Benjamin M. Bloom
 Lisa C. Brown
 Kathryn H. Clarke
 Daniel L. Harris
 Rodger J. Isaacson
 John H. McMillan
 Ralph C. Spooner
 Nancy S. Tauman

Mr. Eugene Buckle, Portland attorney, was a guest at the meeting. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Alexander). Mr. Alexander called the meeting to order at approximately 9:35 a.m.

Agenda Item 2: Approval of July 15, 2000 Council meeting. The minutes of the Council's July 15, 2000 Council meeting were unanimously approved.

Agenda Item 3: Reports (Mr. Alexander):

Report 3A: ORCP 7 D (see Attachment 3A to agenda of this meeting) (Judge Rasmussen). The typos in line 32, Attachment p. 3A-2 were corrected from "vehilce" to "vehicle," and in line 36 of the same page corrected from "perated" to "operated." Friendly amendments were agreed to whereby "the defendant" in line 35 of Attachment p. 3A-2 was changed to "a defendant," and "to an agent" was changed to "other person" in line 14, Attachment p. 3A-1, so that the language of subparagraph D(3)(a)(i) would parallel that of subparagraph D(2)(d)(ii).

Mr. Gaylord suggested that the language between "to serve a defendant" and "by a method authorized by subsection (3) ..." in lines 35-36 of Attachment p. 3A-2 seemed unnecessary and might best be deleted, with which suggestion Judge Carp agreed. Judge Rasmussen said that he wished to consider this suggestion before the next Council meeting, and observed that the language in question might be needed to make clear that this method of service would apply only to operators of motor vehicles or those on whose behalf they are operated, and not, for example, to sellers or manufacturers whose defective product was alleged to be a contributing cause of an accident.

Report 3B ORCP 21 A (see Attachment 3B to agenda of this meeting) (Judge Linder and Mr. Johnson). Judge Linder referred members to a revised draft of this proposed amendment which she said was based on suggestions by Judge Marcus. (A copy of this revision is filed with the original of these minutes.)

Mr. Brothers commented that he thought the draft language was confusing because it linked the granting of a stay with leave to amend the complaint, which could lead to the inference that any time a court granted leave to amend it was also thereby entering a stay. He also observed that the phrase "in its discretion" was redundant in light of the words "the court may," with which observation Judge Marcus agreed. Mr. Gaylord stated that the problem might be trying to accomplish too much in a single sentence, and that it might be solved by having one sentence address the issue of a stay when defense (3) is successfully raised, and another sentence dealing with orders of dismissal pursuant to the other defenses enumerated in section 21 A.

Prof. Holland stated that stays on the basis of prior, duplicative actions pending are quite different things than are routine, brief delays following dismissal orders to allow an amended complaint before entry of judgment of dismissal. Among other differences stays can last for months, even years, while the action is, in effect, placed on hold.

A number of friendly amendments were then suggested and agreed to. As a result of these amendments, the proposed amendment to section 21 A read as follows:

"When the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If dismissal is based on defense (3) the court may enter judgment in favor of the moving party, stay the proceedings, or defer entry of judgment pursuant to subsection B(3) of Rule 54."

It was generally agreed that the two sentences shown above

would be substituted for the final sentence of existing section 21 A. On motion of Mr. Gaylord, seconded by Judge Barron, this amendment was tentatively adopted subject to any final revisions which might be made at the Sept. 9 Council meeting.

Report 3C--ORCP 22 C (see Attachment 3C to agenda of this meeting) (Judge Barron). Judge Barron said that this subcommittee had decided not to change the 90-day period within which third-party complaints can be served as of right, and also not to change the existing requirement that both leave of court and agreement of all parties are needed for a third-party complaint to be served beyond that period. Those decisions, he added, left a single question, which was whether, as Prof. Holland has urged, section 22 C should be amended to accommodate the new rule of several liability among joint tortfeasors enacted in 1995 by ORS 18.470(2).

Prof. Holland interjected that ORS 18.470(2) uses the term "third party defendants," but not in the sense contemplated by section 22 C, under which a third-party defendant must be alleged to be possibly liable to the third-party plaintiff by way of indemnification or contribution. Judge Barron stated that versions 1a, 2a, and 3a shown in Attachment 3C constituted slightly different ways of expanding the meaning of third-party defendants to effectuate procedurally the new substantive rule of several liability and comparative fault among joint tortfeasors.

Mr. Gaylord said he did not think section 22 C should be changed since it embodies the long-established understanding of what third-party defendants are. Mr. Brothers stated that he did not believe the legislature, in enacting ORS 18.470(2), meant to effect such a major change in the common law as argued by Prof. Holland. Prof. Holland responded that the change embodied in ORS 18.470(2) was no more, or less, important a change from common law than the change several years earlier which substituted comparative fault for contributory negligence as between plaintiffs and defendants, and that the 1995 change followed logically from that earlier one. Mr. Brothers replied that, since this statute was a change from common law, he thought the courts would construe it narrowly. Any of the versions proposed would, he added, represent a substantive interpretation of this statute on the part of the Council, which is not part of its role.

Mr. Gaylord commented that, among the choices offered, he preferred version 1a, but remained of the opinion that no amendment to section 22 C should be made and that it should be left to the legislature to clarify ORS 18.470(2) if its present language does not express what it intended.

Discussion of this item concluded with no vote or final decision.

Report 3D: "Exact language" requirement of ORS 1.735(2) (see Attachment 3D to this agenda) (Justice Durham). Justice Durham explained that the suggested statutory amendment set forth in Attachment 3D had been agreed upon by Judge Harris and himself in order to loosen the reins on the Council slightly so that it could take better advantage of any comments received in response to publication of tentatively adopted ORCP amendments. He noted that any changes which might be made to tentatively adopted amendments in the form in which they are finally promulgated would have to be promptly published to the bench and bar, and also specifically described in the letter transmitting promulgated amendments to the legislature. He further observed that the statutory requirement of 15 affirmative votes to promulgate any ORCP amendments provided an additional safeguard against any misuse of the greater flexibility this change would afford. Finally, Justice Durham stated that, in his view, this proposal should be forwarded to the legislature only if it has the support of all Council members.

Mr. Gaylord said he had drafted the following sentence for the purpose of further restricting the ability of the Council to change amendments from the form in which they had been tentatively adopted and published: "After publication pursuant to Part A above, the Council may not further alter language except to improve grammar, style, or to avoid inconsistency with existing law." Judge Barron said he would oppose any additional language of this kind, as he thought it would create more problems than it might solve. Mr. Brothers, however, said that he was inclined to favor something along the lines suggested by Mr. Gaylord, since he was wary of last-minute changes as a general proposition.

Judge Marcus commented that he thought the proposed change to ORS 1.735(2) was needed for the Council to gain the benefit from comments. He urged that it be presented to the legislature candidly, with an effort made to educate legislators on what this change would accomplish and how it might improve the work of the Council. Mr. Alexander, in response to a question, reported that he had contacted the appropriate OSB people about support for this proposal, but had not yet received a response. Mr. Gaylord then withdrew his earlier suggestion about an additional restrictive sentence. The vote on this item was put over to the Sept. 9 Council meeting.

Report 3E. ORCP 44 A (see Attachment 3E to agenda of this meeting) (Justice Durham). Justice Durham reported that the effort of this subcommittee has been to present the Council

with a consensus position and spare the full Council the arduous efforts to balance and compromise the conflicting views of various interest groups and individuals. He added that he had thought such a consensus, which would command wide support, had been reached earlier, but acknowledged that further meetings of subcommittee members would be needed in advance of the September meeting. He mentioned specifically a new draft proposal he received from Mr. Spooner the day before this meeting, which would authorize the presence of examinees' representatives, but not their counsel, and would provide that nothing said in the course of an examination would waive the physician-patient privilege.

Mr. Gene Buckle, a member of the OADC Liaison Committee, was then recognized for any comments he wished to offer. Mr. Buckle questioned whether there is any hard evidence that the current procedure is being abused, and commented that if representatives or the like were present during a CME, defense counsel might well assert the right to depose such persons. He added that he thought that, rather than sweeping broadly as the present proposal does, a better approach might be to adopt language that would underline the court's authority and obligation to deal with any abuses which might occur on a case-by-case basis.

Judge Marcus stated that the view he had formed as a member of the Multnomah County Motion Panel was that use of audiotaping is the least intrusive device and should not prompt objection from any reasonable person. Mr. Buckle responded that he did not have any objection to audiotaping CME's.

Mr. Gaylord wished it noted that, contrary to what appears on Attachment p. 3E-1, he had not been a member of this subcommittee. Judge Carp opined that it did not seem to be beyond the scope of the ORCP to include provisions concerning waiver or preservation of evidentiary objections, since such provisions already exist, as in ORCP 39 B(3) and 41 C(1). Judge Barron remarked that he had never encountered a problem of this sort in connection with section 44 A, and was not persuaded that any such problem existed generally. Justice Durham stated that much of the motivation for undertaking this item was a sense that the trial bench would welcome the greater uniformity and consistency this proposal is intended to provide. Mr. Brothers commented that, to the extent trial judges might be unaware of this problem, that might be because there is presently no method to bring it to their attention.

Discussion of this item concluded with no vote or final decision as to its disposition. It was generally agreed that the subcommittee's draft, with any revisions it might make as a result of its meetings prior to the September 9th meeting, would be included on the agenda of that meeting for further consideration

and vote on whether to tentatively adopt it.

Report 3F (ORCP 44/55) (see Attachment 3F to agenda of this meeting) (Mr. Gaylord). Mr. Gaylord emphasized that there were now three options pending before the Council in the form of Drafts A, B, and C. He added that there were significant differences among these drafts, and urged all members to study each draft carefully in preparation for the September 9th. meeting. He further stated that, at that meeting, the Council could choose to select what it regarded as the best version for tentative adoption and publication, or it could publish all three versions and postpone the final choice until the December meeting, following the comment period.

Judge Coon asked whether there had been any progress in obtaining better understanding of these amendments on the part of the medical community and the defense bar. Mr. Gaylord responded that there had been a second meeting with representatives of these groups just before the Council's July meeting, and that the tone of discussion at that meeting was more cooperative, and less confrontational, than had previously been the case.

Agenda Item 4: Old business. No item of old business was raised.

Agenda Item 5: New business. Mr. Alexander reminded members that the crucially important September 9th meeting might well last beyond the customary noon adjournment time, and that box lunches would be provided. He also reported, with regret, that Ms. Lisa Brown had submitted her resignation as a Council member.

Agenda Item 6: Adjournment. On motion duly made, seconded, and unanimously agreed to, Mr. Alexander adjourned the meeting at 12:10 p.m.

Respectfully submitted,

Maury Holland
Executive Director

PACKET I

(for consideration at Council's
September 9, 2000 meeting)

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**SUMMONS
RULE 7**

4 * * * * *

6 **D Manner of service**

7 * * *

8 D(2) (d) **Service by mail.**

9 * * *

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

18 D(3) **Particular defendants.** Service may be made upon
19 specified defendants as follows:

20 D(3) (a) **Individuals.**

21 D(3) (a) (i) *Generally.* Upon an individual defendant, by
22 personal [service upon] delivery of a true copy of the
23 summons and the complaint to such defendant or [an agent]
24 other person authorized by appointment or law to receive service
25 of summons on behalf of such defendant [or, if defendant
26 personally cannot be found at defendant's dwelling house or usual
27 place of abode, then] by substituted service or by office service
28 [upon such defendant or agent]. Service may also made upon an

29 individual defendant to whom neither subparagraph (ii) nor (iii)
30 of this paragraph applies by mailing made in accordance with
31 paragraph (2)(d) of this section provided the defendant signs a
32 receipt for the certified, registered or express mailing, in which
33 case service shall be complete on the date on which the defendant
34 signs a receipt for the mailing.

35 * * *

36 D(4) Particular actions involving motor vehicles.

37 D(4)(a) Actions arising out of use of roads, highways,
38 and streets or premises open to the public; service by
39 mail.

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

52 * * *

53 D(4)(b) Notification of change of address. [Every
54 motorist or user of the roads, highways, and streets of this

55 state] Any person who, while operating a motor vehicle upon the
56 roads, highways, [or] streets or premises open to the public
57 (as defined by law) of this state, is involved in any accident,
58 collision, or other event giving rise to liability, shall
59 forthwith notify the Department of Transportation of any change of
60 such defendant's address occurring within three years after such
61 accident, collision or event.

62 * * * * *

1 DEFENSES AND OBJECTIONS; HOW PRESENTED;
2 BY PLEADING OR MOTION; MOTION FOR
3 JUDGMENT ON THE PLEADINGS
4 RULE 21

6 A How presented. Every defense, in law or fact, to a
7 claim for relief in any pleading, whether a complaint, counter-
8 claim, cross-claim or third party claim, shall be asserted in the
9 responsive pleading thereto, except that the following defenses
10 may at the option of the pleader be made by motion to dismiss:
11 (1) lack of jurisdiction over the subject matter, (2) lack of
12 jurisdiction over the person, (3) that there is another action
13 pending between the same parties for the same cause, (4) that
14 plaintiff has not the legal capacity to sue, (5) insufficiency of
15 summons or process or insufficiency of service of summons or
16 process, (6) that the party asserting the claim is not the real
17 party in interest, (7) failure to join a party under Rule 29, (8)
18 failure to state ultimate facts sufficient to constitute a claim,
19 and (9) that the pleading shows that the action has not been
20 commenced within the time limited by statute. A motion to
21 dismiss making any of these defenses shall be made before pleading
22 if a further pleading is permitted. The grounds upon which any of
23 the enumerated defenses are based shall be stated specifically and
24 with particularity in the responsive pleading or motion. No
25 defense or objection is waived by being joined with one or more
26 other defenses or objections in a responsive pleading or motion.
27 If, on a motion to dismiss asserting defenses (1) through (7), the
28 facts constituting such defenses do not appear on the face of the

29 pleading and matters outside the pleading, including affidavits
30 and other evidence, are presented to the court, all parties shall
31 be given a reasonable opportunity to present evidence and
32 affidavits, and the court may determine the existence or
33 nonexistence of the facts supporting such defense or may defer
34 such determination until further discovery or until trial on the
35 merits. [When a motion to dismiss has been granted, judgment
36 shall be entered in favor of the moving party unless the court has
37 given leave to file an amended pleading under Rule 25.] If the
38 court grants a motion to dismiss, the court may enter
39 judgment in favor of the moving party or grant leave to
40 file an amended complaint. If the court grants the motion
41 to dismiss on the basis of defense (3), the court may
42 enter judgment in favor of the moving party, stay the
43 proceeding, or defer entry of judgment pursuant to
44 subsection B(3) of this rule.

45 * * * * *

COUNTERCLAIMS, CROSS-CLAIMS
AND THIRD PARTY CLAIMS
RULE 22

* * * * *

C Third party practice.

C(1) After commencement of the action, a defending party plaintiff, 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 third 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

31 transaction or occurrence that is the subject matter of the
32 plaintiff's claim against the third party plaintiff, and the third
33 party defendant thereupon shall assert the third party defendant's
34 defenses as provided in Rule 21 and may assert the third party
35 defendant's counterclaims and cross-claims as provided in this
36 rule. Any party may move to strike the third party claim, or for
37 its severance or separate trial. A third party may proceed under
38 this section against any person not a party to the action who is
39 or may be liable to the third party defendant for all or part of
40 the claim made in the action against the third party defendant.

41 C(2) A plaintiff against whom a counterclaim has been
42 asserted may cause a third party to be brought in under
43 circumstances which would entitle a defendant to do so under
44 subsection C(1) of this section.

45 * * * * *

COUNTERCLAIMS, CROSS-CLAIMS
AND THIRD PARTY CLAIMS
RULE 22

* * * * *

C Third party practice.

C(1) After commencement of the action, a defending party plaintiff, 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 third 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

32 claim against the third party defendant arising out of the
33 transaction or occurrence that is the subject matter of the
34 plaintiff's claim against the third party plaintiff, and the third
35 party defendant thereupon shall assert the third party defendant's
36 defenses as provided in Rule 21 and may assert the third party
37 defendant's counterclaims and cross-claims as provided in this
38 rule. Any party may move to strike the third party claim, or for
39 its severance or separate trial. A third party may proceed under
40 this section against any person not a party to the action who is
41 or may be liable to the third party defendant for all or part of
42 the claim made in the action against the third party defendant.

43 C(2) A plaintiff against whom a counterclaim has been
44 asserted may cause a third party to be brought in under
45 circumstances which would entitle a defendant to do so under
46 subsection C(1) of this section.

47 * * * * *

CLASS ACTIONS
RULE 32

* * * * *

N Attorney fees, costs, disbursements, and litigation expenses.

N(1)(a) Attorney fees for representing a class are subject to control of the court.

* * *

N(1)(e)(v) Appropriate criteria in [OR] DR 2-106 of the Oregon Code of Professional Responsibility.

* * *

* * * * *

BROTHERS
&
ASH
AND ASSOCIATES

August 22, 2000

Via Facsimile (541) 346-3834

Maurice Holland
Executive Director
Council on Court Procedures
1221 University of Oregon
School of Law
Eugene, Oregon 97403-1221

Dear Maury:

You have asked for my proposed amendment to ORCP 34.

I am proposing an amendment to ORCP 34B(2) as shown below (language to be added in **bold underlined**; to be deleted [*in italics enclosed in square brackets*):

"B(2) Against such party's personal representative or successors in interest [*at any time within four months after the date of the first publication of notice to interested persons, but not more than one year after such party's death.*] **unless the personal representative or successor in interest serves notice of the death of the party on the claimant and the claimant fails to substitute the personal representative or successor in interest within four months of service of such notice.**

This amendment puts the burden where it belongs. There is simply no just rationale for allowing the death of a party to a lawsuit which has already been commenced to cause the action to be dismissed because the plaintiff did not discover the defendant's death. This is simply a trap for the unwary and allows a defendant's attorney to "lay low" in the hopes that opposing counsel won't find out that his client is dead. For an example of the trap in action, see Mendez v. Walker, 272 Or. 602, 538 P.2d 939 (1975).

LAW OFFICES

Maurice Holland
August 22, 2000
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There is no longer a statutory basis for such a result. For example, ORS 30.080 through 30.100 provide that claims for relief arising out of injury to a person caused by the wrongful act of another shall not abate upon the death of the wrongdoer. ORS 30.090 provides that if no probate of the estate of the wrongdoer has been instituted within 60 days from the death of the wrongdoer, the court, upon motion of the injured person, shall appoint an administrator of the estate.

ORS 30.100 provides that in the event of the death of a wrongdoer while an action is pending, the court, upon motion of the plaintiff, shall cause to be substituted as defendant the personal representative of the wrongdoer and the action shall continue against such personal representative.

While it makes sense for a person who has a claim against a deceased person to have to comply with rules relating to creditors of estates generally, there is simply no reason why an action which has been filed against an individual should be dismissed because that individual dies if the plaintiff is not made aware of his death. Once a claim has been filed and both sides are represented it is, in my opinion, inappropriate to place the burden on the plaintiff not only to continue the litigation, but also to keep track of the health of the opposing party.

Furthermore, ORCP 34B(2) is probably unconstitutional as written. The provision conflicts with ORS 115.003 which requires a personal representative to ascertain each person who has or asserts a claim against the estate and requires the personal representative to notify each such claimant. That requirement follows a United States Supreme Court decision, Tulsa Professional Collection Services v. Pope, 45 U.S. 478, 108 S.Ct. 1340, holding that a creditor's claim is a property interest and that due process requires a personal representative who could reasonably ascertain the identity of creditors against the estate to give those creditors actual notice, before a claim may be abated.

Pursuant to ORS 115.003, responsibility for failure to give notice to a claimant falls on the personal representative. The net effect is that an attorney representing an insurance company might be successful in having an action dismissed for failure to substitute the personal representative within four months and the injured party would have a claim only against the personal representative or an estate with limited assets.

ORS 115.005(5)(b) provides that this section does not affect or prevent "...[t]o the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which the decedent or personal representative is protected by liability insurance at the time the proceeding is commenced." This section suggests that even if you don't file a claim against a decedent within the time allowed, one may still recover insurance proceeds. However, ORCP 34B would, arguably, cause an action to abate even after an insured decedent has appeared and answered.

One must also consider that there are many claims that may be asserted against a decedent for which there is no insurance coverage. Such claims would be barred by ORS 115.005 and ORCP 34B(2). Ironically, it appears that if a suit has not been filed, a claimant is entitled to actual notice pursuant to ORS 115.003, but if a suit has been filed, pursuant to ORCP 34, it abates if substitution of the personal representative is not completed within four months.

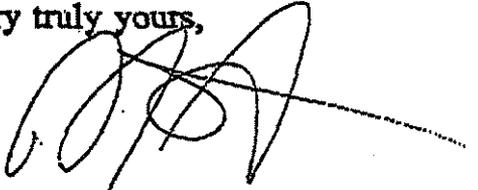
All of the above is complicated by ORS 115.315 which provides, "An action against a decedent commenced before and pending on the date of death of the decedent may be continued as provided in ORCP 34B(2) without presentation of a claim against the estate of the decedent." ORS 115.315 existed prior to the adoption of the Oregon Rules of Civil Procedure. Previously the statute referred to ORS 13.080 which included language identical to ORCP 34B(2). However, ORS 115.003, which places the burden upon the personal representative to notify claimants, was adopted in 1989, following the United States Supreme Court decision requiring notice and subsequent to the adoption of ORCP 34B. Accordingly, the language of ORCP 34B(2) is an anomaly in that it continues to allow the loss of a claim even in the absence of any notice of death. It therefore seems appropriate that the obligation to act be placed on the personal representative and not on the unknowing plaintiff.

At best ORCP 34B(2) is confusing and at worst it provides a defense to a defendant when none would otherwise exist. The potential for injustice is well illustrated in the matter of Castro v. Ogburn, 140 Or. App. 122, 914 P.2d 1, where the court went to great lengths to avoid the harsh results dictated by ORCP 34B. Such gymnastics should not be required. The practice of law is difficult enough without adding the burden of making sure that a negligent party is alive throughout the course of litigation.

Maurice Holland
August 22, 2000
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Thank you for your consideration.

Very truly yours,



BRUCE J. BROTHERS

BJB:rh

3 VERSION ONE

5 PHYSICAL AND MENTAL EXAMINATION OF
6 PERSONS; REPORTS OF EXAMINATIONS
7 RULE 44

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

25 A(1) Compliance with conditions for examination. The
26 parties, the examinee, and their representatives shall
27 comply with any conditions for the examination to which
28 they agree in writing.

29 A(2) Conditions for examination. The examinee may
30 have counsel or another representative present during the

31 examination. All objections to questions asked and the
32 procedure followed during the examination are reserved for
33 trial or other disposition by the court. The examinee may
34 assert, either personally or through counsel, a right
35 protected by the law of privileges. No person may
36 obstruct the examination.

37 A(3) Recordation of examination. Any party, the
38 examinee, or the examining physician or psychologist may
39 record the examination stenographically or by audiotape in
40 an unobtrusive manner. A person who records an
41 examination by audiotape shall retain the original
42 recording without alteration until final disposition of
43 the action unless the court orders otherwise.

44 A(4) Provision of copies of stenographic
45 transcription or audiotape. Upon request, and upon
46 payment of the reasonable charges for transcription and
47 copying, the stenographic reporter shall make a
48 transcription of the examination and furnish a copy of the
49 transcript, or in the case of an audiotape record, the
50 person who records the examination shall make and furnish
51 a copy of the original recording, to any party and the
52 examinee.

53 * * * * *

54 FAILURE TO MAKE DISCOVERY; SANCTIONS
55 RULE 46

57 * * * * *

58 **B Failure to comply with order.**

59 B(1) **Sanctions by court in the county where the**
60 **deponent is located.** If a deponent fails to be sworn or to
61 answer a question after being directed to do so by a circuit court
62 judge in the county in which the deponent is located, the failure
63 may be considered a contempt of court.

64 B(2) **Sanctions by court in which action is pending.**

65 If a party or an officer, director, or managing agent or a person
66 designated under Rule 39 C(6) or 40 A to testify on behalf of a
67 party fails to obey an order to provide or permit discovery,
68 including an order made under section A of this rule or Rule 44,
69 the court in which the action is pending may make such orders in
70 regard to the failure as are just, including among others, the
71 following:

72 B(2)(a) An order that the matters regarding which the order
73 was made or any other designated facts shall be taken to be
74 established for the purposes of the action in accordance with the
75 claim of the party obtaining the order;

76 B(2)(b) An order refusing to allow the disobedient party to
77 support or oppose designated claims or defenses; or prohibiting
78 the disobedient party from introducing designated matters in
79 evidence;

80 B(2)(c) An order striking out pleadings or parts thereof, or
81 staying further proceedings until the order is obeyed, or
82 dismissing the action or any part thereof, or rendering a judgment
83 by default against the disobedient party.

84 B(2)(d) In lieu of any of the foregoing orders or in
85 addition thereto, an order treating as a contempt of court the
86 failure to obey any order except an order to submit to a physical
87 or mental examination.

88 B(2)(e) Such orders as are listed in paragraphs (a), (b),
89 and (c) of this subsection, where a party has failed to comply
90 with an order under section A of Rule 44 requiring the party to
91 produce another for examination, unless the party failing to
92 comply shows inability to produce such person for examination, or
93 where a party, the examinee, or a representative has
94 violated an agreed condition or has obstructed an
95 examination under section A of Rule 44.

96 * * *

VERSION TWO

(submitted by Ralph Spooner)

5 **PHYSICAL AND MENTAL EXAMINATION OF**
6 **PERSONS; REPORTS OF EXAMINATIONS**
7 **RULE 44**

9 A Order for examination. When the mental or physical
10 condition of the blood relationship of a party, or of an agent,
11 employee, or person in the custody or under the legal control of a
12 party (including the spouse of a party in an action to recover for
13 injury to the spouse), is in controversy, the court may order the
14 party to submit to a physical or mental examination by a physician
15 or a mental examination by a psychologist or to produce for
16 examination the person in such party's custody or legal control.
17 The order may be made only on motion for good cause shown and upon
18 notice to the person to be examined and to all parties and shall
20 specify the time, place, manner, conditions, and scope of the
examination and the person or persons by whom it is to be made.

(continued on page 20)

20. examination and the person or persons by whom it is to be made.
21. Unless the trial court requires other or different conditions
22. for good cause supported by the record, the following
23. conditions shall apply to a compelled medical examination
24. under this rule:

25. A(1) Compliance with conditions for examination. The
26. parties, the examinee, and their representative shall comply
27. with any conditions for the examination to which they
28. agree in writing.

29. A(2) Conditions for examination. The examinee may have a
30. non-attorney representative present during the examination.
31. All objections to questions asked and the procedures
32. followed during the examination are reserved for trial
33. or other disposition by the court. In the event the examinee
34. discloses any information protected by the law of privileges,
35. the disclosure shall be presumed not to constitute a
36. waiver of the privilege.

37. A(3) Obstruction of examination. No person may
38. obstruct the examination. If an obstruction occurs, the
39. examinee or the examining physician or psychologist may
40. suspend the examination. The court may order a resumption
41. of the examination under any conditions that the court deems
42. necessary to prevent obstruction. The parties may agree to
43. resume an incomplete examination without an order by
44. the court.

45. A(4) Recordation of examination. Any party, the examinee,
46. or the examining physician or psychologist may record the
47. examination stenographically or by audiotape in an unobtrusive
48. manner. The person requesting the recording shall be required
49. to furnish at their expense, an original transcript of the
50. stenographic notes or audiotape to the attorney for the examinee,
51. or if unrepresented, to the examinee. The transcription of the
52. stenographic notes or audiotape shall be first made available
53. to the attorney for the examinee or the examinee, if unrepresented,
54. for the purpose of determining whether any privileged information
55. was disclosed by the examinee. If there is a claim that privileged
56. information was disclosed and that it should be redacted from

57. the transcript, the attorney for the examinee or the examinee,
58. if unrepresented, shall provide a privilege log of the information
59. claimed to be privileged stating the general nature of the
60. information and the basis for the claimed privilege to the
61. attorney(s) for the other party(ies) or if unrepresented, to the other
62. party(ies). Any challenges to the claimed privilege will be
63. resolved by the trial court following an *en camera* review of the
64. information claimed to be privileged. After any claim of privilege
65. is resolved, the attorney for the examinee or the examinee, if
66. unrepresented, shall provide a copy of the transcript, with
67. privileged information redacted as ordered by the trial court,
68. to the attorney(s) for the other party(ies) or if unrepresented,
69. to the other party(ies). The reasonable cost of the copy of the
70. transcript shall be paid by the receiving party(ies).

2 DISMISSAL OF ACTIONS; COMPROMISE
3 RULE 54

5 * * * * *

6 E Compromise; effect of acceptance or rejection.

7 Except as provided in ORS 17.065 through 17.085, the party against
8 whom a claim is asserted may, at any time up to 10 days prior to
9 trial, serve upon the party asserting the claim an offer to allow
10 judgment, exclusive of attorney fees, costs, and
11 disbursements, to be given against the party making the offer
12 for the sum, or the property, or to the effect therein specified.
13 If the party asserting the claim accepts the offer, the party
14 asserting the claim or such party's attorney shall endorse such
15 acceptance thereon, and file the same with the clerk before trial;
16 and within three days from the time it was served upon such party
17 asserting the claim; and thereupon judgment shall be given
18 accordingly, as a stipulated judgment. Unless the parties
19 [*agreed upon*] agree otherwise by [*the parties*] a separate
20 document, costs, disbursements, and attorney fees shall be
21 entered in addition as part of such judgment as provided in Rule
22 68. If the offer is not accepted and filed within the time
23 prescribed, it shall be deemed withdrawn, and shall not be given
24 in evidence on the trial; and if the party asserting the claim
25 fails to obtain a more favorable judgment, the party asserting the
26 claim shall not recover costs, prevailing party fees, disburse-
27 ments, or attorney fees incurred after the date of the offer, but
28 the party against whom the claim was asserted shall recover of the

30 party asserting the claim costs and disbursements, not including
31 prevailing party fees, from the time of the service of the offer.

32 * * * * *

Jury reform proposals being considered by the Council on Court Procedures

The subcommittee has met to consider the feedback received from the judicial conference and, from that and other input, to refine the proposals before the committee for presentation to the full council for discussion.

PROPOSAL No. 1 - Amendments to ORCP 58 A and B

(Amending language in bold; deleted language in [brackets])

A. Order on Proceedings on Trial by the Court.

Trial by the court shall proceed in the order as prescribed in subsections (3) through (6) of section B of this rule unless the court for good cause stated in the record otherwise directs.

B. Order of Proceedings on Jury Trial.

The trial by a jury shall proceed in the following order unless the court, for good and sufficient reason stated in the record, otherwise directs:

B. (1) The jury shall be selected and sworn. Prior to voir dire, each party may, with the court's consent, present a concise statement of the facts to the entire jury panel.

B. (2) After the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting questions of witnesses if permitted, and the elementary legal principles that will govern the proceedings.

*under
consider-
tion*

B. (3) The plaintiff shall concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, shall state defendant's case based upon any defense or counterclaim.

B. (4) The plaintiff shall [then] introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.

B. (5) The parties respectively [then] may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense or counterclaim.

B. (6) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

B. (7) Not more than two counsel shall address the jury on [in] behalf of the plaintiff or defendant; the whole time occupied on [in] behalf of either shall not be limited to less than two hours.

B. (8) After the evidence is concluded, the court shall instruct the jury. *court may instruct the jury*
~~The instructions may be given before or after the closing arguments.~~

B. (9) With the court's consent, *the court shall permit*
~~jurors are permitted to submit to the court questions directed to witnesses or to the court. The parties shall be given an opportunity to object to such questions out of the presence of the jury.~~

The court shall afford
PROPOSAL No. 2 - Alternate juror rule amendments

A number of proposals have been discussed regarding the method of selecting alternate jurors. The goal is to improve the experience from the juror's perspective. The proposals have principally centered around two possible new methods for selecting alternate jurors:

1. Do not distinguish between the jurors and alternates until the end of the case. The following language was suggested by the OSB Procedure and Practice Committee for this approach:

The identity of alternate jurors shall not be determined until the end of the trial. At the time of impanelment, the trial judge shall inform the jurors that at the end of the case, the alternate jurors will be determined by lot in a drawing held in open court.

2. Choose the alternate jurors during jury selection, but don't tell the jurors who the alternates are until the case is handed off to the jury at the end of the trial. The court and counsel would know who they are at the time of selection.

It is recommended that this issue be studied further before being formally considered by the council.

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
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.

REVISED

PACKET II

(for consideration at Council's
September 9, 2000 meeting)

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**PHYSICAL AND MENTAL
EXAMINATION OF PERSONS;
REPORTS OF EXAMINATIONS**

RULE 44

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.

→ UNCHANGED

*(But see proposed
New rule 44A)*

B Report of examining physician or psychologist. If requested by the party against whom an order is made under section A of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician or psychologist setting out such physician's or psychologist's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

→ UNCHANGED

~~**C Reports of examinations; claims for damages for injuries.** In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.~~

→ DELETE TITLE AND TEXT. See new title and text.

~~**D Report; effect of failure to comply.**~~

~~**D(1) Preparation of written report.** If an obligation to furnish a report arises under sections B or C of this rule and the examining physician or psychologist has not made~~

→ DELETE

17 K V L C 47 T

a written report, the party who is obliged to furnish the report shall request that the examining physician or psychologist prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examiner's fee, necessary to prepare such a report.

→ DELETE

D(2) Failure to comply or make report or request report. If a party fails to comply with sections B and C of this rule, or if a physician or psychologist fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician or psychologist prepare a written report within a reasonable time, the court may require the physician or psychologist to appear for a deposition or may exclude the physician's or psychologist's testimony if offered at the trial.

→ DELETE

E Access to hospital records. Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B. Hospital records shall be obtained by subpoena in accordance with Rule 55 H. (CCP 12/2/78; §5A, E amended by c.284 §§27, 28; §E amended by CCP 12/4/82; §C amended by CCP 12/13/86; §5C, E amended by CCP 12/10/88 and 1/6/89; §5A, B, D amended by 1989 c-1084 §2)

→ DELETE

SUBPOENA

RULE 55

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

B For production of books, papers, documents, or tangible things and to permit inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things but not commanded to also appear for deposition, hearing or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the sub-

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unchanged)**

(see note regarding F(3))

**(A through G
unchanged)**

*(see note regarding
F(3))*

poena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents or tangible things the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C Issuance.

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

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

D Service; service on law enforcement agency; service by mail; proof of service.

D(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, whether or not per-

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

D(2) Service on law enforcement agency.

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

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

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

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

D(3) Service by mail.

Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section:

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

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

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

D(4) **Service by mail; exception.** Service of subpoena by mail may be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

D(5) **Proof of service.** Proof of service of a subpoena is made in the same manner as proof of service of a summons except that the server need not certify that the server is not a party in the action, an attorney for a party in the action or an officer, director or employee of a party in the action.

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

F Subpoena for taking depositions or requiring production of books, papers, documents, or tangible things; place of production and examination.

F(1) **Subpoena for taking deposition.** Proof of service of a notice to take a deposition as provided in Rules 39 C and 40 A, or of notice of subpoena to command production of books, papers, documents, or tangible things before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be

served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein.

F(2) **Place of examination.** A resident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, or tangible things only in the county wherein such person resides, is employed or transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, or tangible things only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

F(3) **Production without examination or deposition.** A party who issues a subpoena may command the person to whom it is issued, ~~other than a hospital~~, to produce books, papers, documents, or tangible things, by mail or otherwise, at a time and place specified in the subpoena, without commanding inspection of the originals or a deposition. In such instances, the person to whom the subpoena is directed complies if the person produces copies of the specified items in the specified manner and certifies that the copies are true copies of all the items responsive to the subpoena or, if all items are not included, why they are not.

*other than
medical
records*

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

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unchanged)**

*(see note
regarding F(3))*

H Hospital records.

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.

→ DELETED. See new title and text.

H(2) Mode of compliance. Hospital records may be obtained by subpoena 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.

→ Delete here, but see new subsection number with revisions.

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body

→ Delete here.

conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph H(2)(b)(iv), then a copy of the subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the hospital.

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

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

H(3) Affidavit of custodian of records.

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

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

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

→ Deleted here.

→ Deleted here. See new text.

H(4) Personal attendance of custodian of records may be required.

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

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

→ Delete here. See new text under different section number.

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

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

→ ~~Delete here.~~ See new subsection regarding fees.

I Medical records.

~~I(1) Service on patient or health care recipient required. Except as provided in subsection (3) of this section, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is not valid unless proof of service of a copy of the subpoena on the patient or health care recipient, or upon the attorney for the patient or health care recipient, made in the same manner as proof of service of a summons, is attached to the subpoena served on the custodian or other keeper of medical records.~~

→ Delete here. See new title and text.

~~I(2) Manner of service. If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient not less than 14 days before the subpoena is served on a custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 14-day period. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by Rule 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient not less than 14 days before the subpoena is served on the custo-~~

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dian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 14-day period. Service on a patient or health care recipient under this section must be made in the manner specified by Rule 7 D(3)(a) for service on individuals.

(3) Affidavit of attorney. If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is valid if the attorney for the person serving the subpoena attaches to the subpoena the affidavit of the attorney attesting to the following: (a)

That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and (c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

(4) Application. The requirements of this section apply only to subpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550, a health care service contractor as defined in ORS 750.005, a home health agency licensed under ORS chapter 443 or a hospice program licensed, certified or accredited under ORS chapter 443. [CCP 12/2/78; §§A, C, H amended by 1979 c.284 §§33, 34, 35; §D(1), F(2) amended by CCP 12/13/80; §D amended by CCP 12/4/82; §D amended by 1983 c.751 §5; §H(2) amended by CCP 12/13/86; H(2) amended by CCP 12/10/88 and 1/5/89; §E amended by 1989 c.980 §3; amended by CCP 12/15/90; §H amended by 1993 c.18 §3; §D amended by CCP 12/10/94 and 1995 c.79 §404; §§F, H amended by CCP 12/10/94; §I enacted by 1995 c.694 §1; §I amended by CCP 12/14/96; §D amended by 1997 c.249 §10; §C amended by 1999 c.59 §6; §I amended by CCP 12/12/98]

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→ UNCHANGED

VERSION ONE

Draft "A" (the Committee draft with scope of discovery in Rule 44 C(2) and 55 H(2) corrected) for consideration at 9-9-00 Council meeting

New language (different from the draft submitted with the 8-12-00 agenda) is underlined...

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

8 **PRETRIAL DISCOVERY OF HEALTH CARE RECORDS;**
9 **PHYSICAL AND MENTAL EXAMINATION OF PERSONS;**
10 **REPORTS OF EXAMINATIONS**
11 **RULE 44**

13 A. Order for examination.

14 (text unchanged)

15 B. Report of examining physician or psychologist.

16 (text unchanged)

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

20 (delete title and text)

22 C. Health Care Records.

23 C(1) *Definitions.* As used in this rule, "health care
24 records" means medical records as defined in ORS
25 192.525(8), health care records of a health care provider
26 as defined in ORS 192.525(9) and (10), and health care
27 records of a community health program established under
28 ORS 430.610 through 430.695.

31 **C(2) Pretrial discovery of health care records from a party.**
32 Any party against whom a civil action is filed for damages
33 ~~for injuries to the party or to a person in the custody or~~
34 ~~under the legal control of a party, or for damages for the~~
35 ~~death of a person whose estate is a party,~~ may obtain
36 copies of all health care records relating to the injury
37 for which recovery is sought within the scope of discovery
38 under section B of Rule 36 by either

to another party for injuries or death

40 C(2)(a) serving a request for production for such
41 records on the ~~injured~~ ^{damaged} party or its legal custodian or
42 guardian pursuant to Rule 43; or

44 C(2)(b) obtaining the voluntary written consent
45 to release of the records to such party from the ~~injured~~ ^{damaged}
46 party or its legal custodian or guardian before seeking
47 them from the health care provider.

49 **C(3) Pretrial discovery of health care records directly from**
50 **health care provider or facility.** Health care records within
51 the scope of discovery under section B of Rule 36 may be
52 obtained by a party against whom a civil action is filed
53 for damages ~~for injuries to the party or to a person in~~
54 ~~the custody or under the legal control of a party, or for~~
55 ~~damages for the death of a person whose estate is a party,~~
56 only by the procedure described in paragraph (2)(b) above,
57 or by the procedures described in section H of Rule 55,
58 Pretrial subpoena of health care records from health care
59 provider or facility.

to another party for injuries or death,

61 D. Report; effect of failure to comply.

62
63 (delete section entirely)

65 E. Access to hospital records.

66
67 (delete section entirely)

68

SUBPOENA
RULE 55

80
81

84 (A through G unchanged.)

86 * * * * *

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

90 H(1) [Hospital. As used in this rule, unless the context
91 requires otherwise, "hospital" means a health care facility
92 defined in ORS 442.015(14) (a) through (d) and licensed under ORS
93 441.015 through 441.097 and community health programs established
94 under ORS 430.610 through 430.695.] **Definition.** For purposes of
95 this section health care records are defined in subsection
96 C(1) of Rule 44.

98 H(2) **Service of subpoena and authorization.** Except when
99 it is provided with a voluntary written consent to release
100 of the health care records pursuant to paragraph (c)(2)(b)
101 of Rule 44, any party against whom a civil action is filed
102 for damages ~~for injuries to the party or to a person in~~
103 ~~the custody or under the legal control of a party, or for~~
104 ~~damages for the death of a person whose estate is a party,~~
105 may obtain copies of health care records relating to the
106 injury for which recovery is sought within the scope of
107 discovery under section B of Rule 36 directly from a
108 health care provider or facility only by serving upon the
109 party whose health care records, or whose decedent's
110 health care records are sought:

to another party for injuries or death

112 H(2)(a) a SUBPOENA for such records directed to
113 the health care provider, accompanied by statutory witness
114 fees calculated as for a deposition at the place of
115 business of the custodian of the records, and

117 H(2)(b) simultaneously, an AUTHORIZATION TO
118 DISCLOSE HEALTH CARE RECORDS in the form provided by ORS
119 192.525(3), on which the following information has been
120 designated with reasonable particularity: the name of the
121 health care provider or providers or facility or
122 facilities from which records are sought, the categories
123 or types of records sought, and the time period,
124 treatment, or claim for which records are sought. If the
125 name of a health care provider or facility is unknown to
126 the party seeking records, they may designate "all" health
127 care providers or facilities, or "all" of them within a
128 described category. The AUTHORIZATION shall designate the

129 attorney for the party whose records are sought, or that
130 party if unrepresented, as the persons to whom the records
131 are released

133 **H(3) Return of service of subpoena and authorization;**
134 **objections.** Within 14 days after receipt of service of such
135 a SUBPOENA and AUTHORIZATION TO DISCLOSE HEALTH CARE
136 RECORDS, a party whose records are sought shall:

138 H(3)(a) as to any part of the request to which it
139 does not object, obtain the signature of a person able to
140 consent to the release of the requested records or
141 authorized by law to obtain the records, as used in ORS
142 192.525 (2), and a date of signature, on the AUTHORIZATION
143 and, either

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

149 or

153 H(3)(a)(ii) serve the SUBPOENA and
154 AUTHORIZATION by mail on the health care
155 provider or providers or facility or
156 facilities indicated, along with the
157 STATEMENT OF INSTRUCTIONS provided in section
6 below; and

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

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

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

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

178 health care provider or facility hereunder, the party
179 whose records are sought shall prepare and serve on the
180 hospital or health care provider with the AUTHORIZATION
181 the following STATEMENT OF INSTRUCTIONS:

183 H(6)(a) Enclosed with this STATEMENT OF
184 INSTRUCTIONS is a statutory SUBPOENA and AUTHORIZATION TO
185 DISCLOSE MEDICAL RECORDS pursuant to ORS 192.525(3) which
186 has been signed by a person able to consent to the release
187 of the requested records or authorized by law to obtain
188 the records. Copies of the designated records are sought
189 by each of the following parties:

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

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

198 H(6)(b) In order to comply with this
199 Authorization and these instructions, please make ____
200 copies of the designated records, place each copy in a
201 separately sealed package bearing the address and postage
202 to each of the names identified above, and place all of
203 them together in one package or shipment, and mail that
204 package within five (5) days of this date to the person
205 whose records are sought or his or her representative,
206 whose name and address are listed first above. Only
207 _____ (name of person or his or her attorney whose
208 records are sought) is authorized to receive the copies of
209 these records directly from you.

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

218 H(7) *Mode of compliance.* Health care records may be
219 obtained by subpoena pretrial only as provided in this
220 section. However, if disclosure of any requested records
221 is restricted or otherwise limited by state or federal
222 law, then the protected records shall not be disclosed in
223 response to the subpoena unless the requirements of the
224 pertinent law have been complied with and such compliance
225 is evidenced through an appropriate court order or through
226 execution of an appropriate consent. Absent such consent
227 or court order, production of the requested records not so

228 protected shall be considered production of the records
229 responsive to the subpoena. If an appropriate consent or
230 court order does accompany the subpoena, then production
231 of all records requested shall be considered production of
232 the records responsive to the subpoena.
233

234 H(7)(a) Except as provided in subsection (9) of
235 this section, when a subpoena is served upon a custodian
236 of health care records in an action in which the health
237 care provider is not a party, and the subpoena requires
238 the production of all or part of the records of the health
239 care provider relating to the care or treatment of a
240 patient of the health care provider, it is sufficient
241 compliance therewith if a custodian delivers by mail or
242 otherwise the number of true and correct copies of all the
243 records responsive to the subpoena indicated in the
244 subpoena or statement of instructions, within five days
245 after receipt thereof. Delivery shall be accompanied by
246 the affidavit described in subsection 8 of this section.
247 The copies may be photographic or microphotographic
248 reproduction.

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

252 H(8)(a) ^{Each copy of} The records described in this section
253 shall be accompanied by the affidavit of the custodian of
254 the health care provider, stating in substance each of the
255 following: (i) that the affiant is a duly authorized
256 custodian of the records and has authority to certify
257 records; (ii) that the copies are true copies of all the
258 records responsive to the subpoena; (iii) that the records
259 were prepared by the personnel of the health care
260 provider, in the ordinary course of its business, at or
261 near the time of the act, condition, or event described or
262 referred to therein.
263

264 H(8)(b) If the health care provider has none of
265 the records described in the subpoena, or only part
266 thereof, the affiant shall so state in the affidavit, and
267 shall send only those records of which the affiant has
268 custody.

270 H(8)(c) When more than one person has knowledge
271 of the facts required to be stated in the affidavit, more
272 than one affidavit may be made.

274 H(9) *Personal attendance of custodian of records may be required.*

276 H(9)(a) The personal attendance of a custodian
277 of health care provider records and the production of

278 original health care provider records are required if the
279 subpoena duces tecum contains the following statement:

281

283 The personal attendance of a custodian of health care
284 ~~provider~~ records and the production of original records *
285 are required by this subpoena. The procedure authorized
286 pursuant to Oregon Rule of Civil Procedure 55 H(7) and (8)
287 shall not be deemed sufficient compliance with this
288 subpoena.
289

291 H(9)(b) If more than one subpoena duces tecum is
292 served on a custodian of health care ~~provider~~ records and typ
293 personal attendance is required under each pursuant to
294 paragraph (a) of this subsection, the custodian shall be
295 deemed to be the witness of the party serving the first
296 such subpoena.

298 ~~H(10) Fees for copies. A health care provider may charge~~
299 ~~a reasonable fee for responding to a release authorization~~
300 ~~or subpoena for health care records. A reasonable fee for~~
301 ~~copying and providing such records shall not exceed~~
302 ~~twenty-five cents (\$0.25) per page, less any prepaid~~
303 ~~witness fee, in the absence of personal attendance by the~~
304 ~~custodian of the records.~~

*Insert existing
H(5) penalty
and payment
of fees.*

306 H(11) *Obligation of party or attorney of party whose health care*
307 *records are received from health care provider pursuant to subpoena.*
308 Upon receipt of the sealed copies of the health care
309 records addressed to each of the parties seeking access to
310 them, the party whose records are sought, or his or her
311 attorney, shall open only the copy addressed to that party
312 or attorney, and shall have 14 days in which to review
313 them. Not later than 14 days after receipt of the records
314 from the health care provider or facility, the party whose
315 records are sought shall either serve the unopened copies
316 of the records on each party seeking them, or shall serve
317 each such party with objections to their production
318 pursuant to Rule 43 B.

320 H(11)(a) *Privilege or objection log.* When a party
321 objects to the provision of health care records otherwise
322 discoverable by subpoena pursuant to this section, the
323 party shall make the objection expressly and shall
324 describe the nature of the records objected to in a manner
325 that, without revealing information which is privileged or

326 protected, will enable other parties to assess the
327 applicability of the privilege or protection.

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

337 H(12) *Limited waiver of privilege.* Nothing contained in
338 this section, or in the use of the AUTHORIZATION TO
339 DISCLOSE MEDICAL RECORDS, shall constitute a waiver of any
340 common law or statutory privilege against disclosure of
341 any health care records, or any other confidential
342 communication between any party and a health care provider
343 or facility, beyond the contents of the records for which
344 disclosure is specifically authorized, and to the parties
345 to whom disclosure is specifically authorized under this
346 section.

349 H(13) *Return or destruction of records.* Any health care
350 records obtained pursuant to this section shall only be
351 used for purposes of the pending litigation. After the
352 litigation is resolved, the health care records shall be
353 either returned to the party whose records they are or
destroyed.

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

358 I(1) *Subpoena to trial.* Notwithstanding section H of this
359 rule, a subpoena of health care records to trial may be
360 served directly on the health care facility or its health
361 care records custodian by the party seeking the health
362 care records without an AUTHORIZATION TO DISCLOSE HEALTH
363 CARE RECORDS described in paragraph H(2)(b) of this rule
364 or a STATEMENT OF INSTRUCTIONS described in paragraph
365 H(2)(b) of this rule.

367 I(1)(a) Except as indicated in subsection (2) of
368 this section, it is sufficient compliance with such a
369 subpoena if a custodian delivers by mail or otherwise a
370 true and correct copy of all the records responsive to the
371 subpoena within five days after receipt thereof, sealed in
372 an envelope addressed to the clerk of the court where the
373 action is pending, accompanied by an affidavit described

374 in subsection H(8) of this rule. The copy may be
375 photographic or micro photographic. The copy of the
376 records shall be separately enclosed in a sealed envelope
377 or wrapper on which the title and number of the action,
378 name of the health care provider or facility, and date of
379 the subpoena are clearly inscribed. The sealed envelope
380 or wrapper shall be enclosed in an outer envelope or
381 wrapper and sealed. The outer envelope shall be addressed
382 to the clerk of the court or to the judge if there is no
383 clerk.

385 I(1)(b) The package containing records produced
386 in response to a subpoena to trial shall remain sealed and
387 shall be opened only at the time of trial at the direction
388 of the judge or with agreement of the parties. The
389 records shall be opened in the presence of all parties who
390 have appeared. Records which are not introduced in
391 evidence or required as part of the record shall be
392 returned to the custodian who submitted them.

394 I(2) *Personal attendance of records custodian.* The personal
395 attendance of a custodian of health care records and the
396 production of original health care records at a trial or
397 deposition is required if a subpoena duces tecum contains
398 the following statement:

401 The personal attendance of a custodian of health
402 care records and the production of the original
403 records are required by this subpoena. The
404 procedures authorized by section C of Rule 44 or
405 section H of this rule shall not be deemed
406 sufficient compliance with this subpoena.
407

409 ~~I(2) through I(4) unchanged~~ ^{deleted}

VERSION TWO

Draft "B" (same as Draft "A" except provider only packages two copies, one for subpoenaing party and one for patient) for consideration at 9-9-00 Council meeting.

New language (different from the draft submitted with the 8-12-00 agenda) is underlined.

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

8 **PRETRIAL DISCOVERY OF HEALTH CARE RECORDS;**
9 **PHYSICAL AND MENTAL EXAMINATION OF PERSONS;**
10 **REPORTS OF EXAMINATIONS**
11 **RULE 44**

13 A. Order for examination.

14 (text unchanged)

15 B. Report of examining physician or psychologist.

16 (text unchanged)

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

20 (delete title and text)

22 C. Health Care Records.

23 **C(1) Definitions.** As used in this rule, "health care
24 records" means medical records as defined in ORS
25 192.525(8), health care records of a health care provider
26 as defined in ORS 192.525(9) and (10), and health care
27 records of a community health program established under
28 ORS 430.610 through 430.695.

30 **C(2) Pretrial discovery of health care records from a party.**
31 Any party against whom a civil action is filed for damages

to another party for injuries or death

32 ~~for injuries to the party or to a person in the custody or~~
33 ~~under the legal control of a party, or for damages for the~~
34 ~~death of a person whose estate is a party, may obtain~~
35 copies of all health care records relating to the injury
36 for which recovery is sought within the scope of discovery
37 under section B of Rule 36 by either

39 C(2)(a) serving a request for production for such
40 records on the ~~injured~~ ^{damaged} party or its legal custodian or
41 guardian pursuant to Rule 43; or

43 C(2)(b) obtaining the voluntary written consent
44 to release of the records to such party from the ~~injured~~ ^{damaged}
45 party or its legal custodian or guardian before seeking
46 them from the health care provider.

48 C(3) *Pretrial discovery of health care records directly from*
49 *health care provider or facility.* Health care records within
50 the scope of discovery under section B of Rule 36 may be
51 obtained by a party against whom a civil action is filed
52 for damages ~~for injuries to the party or to a person in~~
53 ~~the custody or under the legal control of a party, or for~~
54 ~~damages for the death of a person whose estate is a party,~~
55 only by the procedure described in paragraph (2)(b) above,
56 or by the procedures described in section H of Rule 55,
57 Pretrial subpoena of health care records from health care
58 provider or facility.

to another party for injuries or death,

60 D. Report; effect of failure to comply.

61
62 (delete section entirely)

64 E. Access to hospital records.

65
66 (delete section entirely)
67

SUBPOENA
RULE 55

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(A through G unchanged.)

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H. [Hospital Records] *Pretrial subpoena of health care records*
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.

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 relating to the injury for which recovery is sought 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:

to another party for injuries or death,

H(2)(a) a 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

131 attorney for the party whose records are sought, or that
132 party if unrepresented, as the persons to whom the records
133 are released

135 H(3) *Return of service of subpoena and authorization;*
136 *objections.* Within 14 days after receipt of service of such
137 a SUBPOENA and AUTHORIZATION TO DISCLOSE HEALTH CARE
138 RECORDS, a party whose records are sought shall:

140 H(3)(a) as to any part of the request to which it
141 does not object, obtain the signature of a person able to
142 consent to the release of the requested records or
143 authorized by law to obtain the records, as used in ORS
144 192.525 (2), and a date of signature, on the AUTHORIZATION
145 and, either

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

152 or

155 H(3)(a)(ii) serve the SUBPOENA and
156 AUTHORIZATION by mail on the health care
157 provider or providers or facility or
158 facilities indicated, along with the
159 STATEMENT OF INSTRUCTIONS provided in section
6 below; and

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

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

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

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

180 health care provider or facility hereunder, the party
181 whose records are sought shall prepare and serve on the
182 hospital or health care provider with the AUTHORIZATION
183 the following STATEMENT OF INSTRUCTIONS:

185 H(6)(a) Enclosed with this STATEMENT OF
186 INSTRUCTIONS is a statutory SUBPOENA and AUTHORIZATION TO
187 DISCLOSE MEDICAL RECORDS pursuant to ORS 192.525(3) which
188 has been signed by a person able to consent to the release
189 of the requested records or authorized by law to obtain
190 the records. Copies of the designated records are sought
191 by each of the following parties:

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

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

200 H(6)(b) In order to comply with this
201 Authorization and these instructions, please make two
202 copies of the designated records, place each copy in a
203 separately sealed package bearing the address and postage
204 to each of the names identified above, and place [all]
205 each of them together in one package or shipment, and mail
206 that package within five (5) days of this date to the
207 person whose records are sought or his or her
208 representative, whose name and address are listed first
209 above. Only _____ (name of person or his or her
210 attorney whose records are sought) is authorized to
211 receive the copies of these records directly from you.

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

220 H(7) *Mode of compliance.* Health care records may be
221 obtained by subpoena pretrial only as provided in this
222 section. However, if disclosure of any requested records
223 is restricted or otherwise limited by state or federal
224 law, then the protected records shall not be disclosed in
225 response to the subpoena unless the requirements of the
226 pertinent law have been complied with and such compliance
227 is evidenced through an appropriate court order or through
228 execution of an appropriate consent. Absent such consent
229 or court order, production of the requested records not so

230 protected shall be considered production of the records
231 responsive to the subpoena. If an appropriate consent or
232 court order does accompany the subpoena, then production
233 of all records requested shall be considered production of
234 the records responsive to the subpoena.
235

236 H(7)(a) Except as provided in subsection (9) of
237 this section, when a subpoena is served upon a custodian
238 of health care records in an action in which the health
239 care provider is not a party, and the subpoena requires
240 the production of all or part of the records of the health
241 care provider relating to the care or treatment of a
242 patient of the health care provider, it is sufficient
243 compliance therewith if a custodian delivers by mail or
244 otherwise the number of true and correct copies of all the
245 records responsive to the subpoena indicated in the
246 subpoena or statement of instructions, within five days
247 after receipt thereof. Delivery shall be accompanied by
248 the affidavit described in subsection 8 of this section.
249 The copies may be photographic or microphotographic
250 reproduction.

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

254 H(8)(a) Each copy of the [The] records described
255 in this section shall be accompanied by the affidavit of
256 the custodian of the health care provider, stating in
257 substance each of the following: (i) that the affiant is
258 a duly authorized custodian of the records and has
259 authority to certify records; (ii) that the copies are
260 true copies of all the records responsive to the subpoena;
261 (iii) that the records were prepared by the personnel of
262 the health care provider, in the ordinary course of its
263 business, at or near the time of the act, condition, or
264 event described or referred to therein.
265

266 H(8)(b) If the health care provider has none of
267 the records described in the subpoena, or only part
268 thereof, the affiant shall so state in the affidavit, and
269 shall send only those records of which the affiant has
270 custody.

272 H(8)(c) When more than one person has knowledge
273 of the facts required to be stated in the affidavit, more
274 than one affidavit may be made.

276 H(9) *Personal attendance of custodian of records may be required.*

278 H(9)(a) The personal attendance of a custodian
279 of health care provider records and the production of

280 original health care provider records are required if the
281 subpoena duces tecum contains the following statement:

285 -----

287 The personal attendance of a custodian of health care
288 ~~provider~~ records and the production of original records *
289 are required by this subpoena. The procedure authorized
290 pursuant to Oregon Rule of Civil Procedure 55 H(7) and (8)
291 shall not be deemed sufficient compliance with this
292 subpoena.
293

295 H(9)(b) If more than one subpoena duces tecum is
296 served on a custodian of health care ~~provider~~ records and
297 personal attendance is required under each pursuant to
298 paragraph (a) of this subsection, the custodian shall be
299 deemed to be the witness of the party serving the first
300 such subpoena.

302 H(10) ~~Fees for copies.~~ A health care provider may charge
303 a reasonable fee for ~~responding to a release authorization~~
304 or subpoena for health care records. A reasonable fee for
305 copying and providing such records shall not exceed
306 twenty-five cents (\$0.25) per page, less any prepaid
307 witness fee, in the absence of personal attendance by the
308 custodian of the records.

ty po
replace with
existing
H(5) Tende
and payment
of fees.

310 H(11) *Obligation of party or attorney of party* ^{party} *whose health care*
311 *records are received from health care provider pursuant to subpoena.*
312 Upon receipt of the sealed copies of the health care
313 records addressed to ~~each of the parties~~, seeking access to
314 them, the party whose records are sought, or his or her
315 attorney, shall open only the copy addressed to that party
316 or attorney, and shall have 14 days in which to review
317 them. Not later than 14 days after receipt of the records
318 from the health care provider or facility, the party whose
319 records are sought shall either serve the unopened
320 [copies] copy of the records on [each] the party seeking
321 them, or shall serve [each] such party with objections to
322 their production pursuant to Rule 43 B.

324 H(11)(a) *Privilege or objection log.* When a party
325 objects to the provision of health care records otherwise
326 discoverable by subpoena pursuant to this section, the
327 party shall make the objection expressly and shall

328 describe the nature of the records objected to in a manner
329 that, without revealing information which is privileged or
330 protected, will enable other parties to assess the
331 applicability of the privilege or protection.

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

341 H(12) *Limited waiver of privilege.* Nothing contained in
342 this section, or in the use of the AUTHORIZATION TO
343 DISCLOSE MEDICAL RECORDS, shall constitute a waiver of any
344 common law or statutory privilege against disclosure of
345 any health care records, or any other confidential
346 communication between any party and a health care provider
347 or facility, beyond the contents of the records for which
348 disclosure is specifically authorized, and to the parties
349 to whom disclosure is specifically authorized under this
350 section.

352 H(13) *Return or destruction of records.* Any health care
353 records obtained pursuant to this section shall only be
354 used for purposes of the pending litigation. After the
355 litigation is resolved, the health care records shall be
356 either returned to the party whose records they are or
357 destroyed.

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

363 I(1) *Subpoena to trial.* Notwithstanding section H of this
364 rule, a subpoena of health care records to trial may be
365 served directly on the health care facility or its health
366 care records custodian by the party seeking the health
367 care records without an AUTHORIZATION TO DISCLOSE HEALTH
368 CARE RECORDS described in paragraph H(2)(b) of this rule
369 or a STATEMENT OF INSTRUCTIONS described in paragraph
370 H(2)(b) of this rule.

372 I(1)(a) Except as indicated in subsection (2) of
373 this section, it is sufficient compliance with such a
374 subpoena if a custodian delivers by mail or otherwise a
75 true and correct copy of all the records responsive to the

376 subpoena within five days after receipt thereof, sealed in
377 an envelope addressed to the clerk of the court where the
378 action is pending, accompanied by an affidavit described
379 in subsection H(8) of this rule. The copy may be
380 photographic or micro photographic. The copy of the
381 records shall be separately enclosed in a sealed envelope
382 or wrapper on which the title and number of the action,
383 name of the health care provider or facility, and date of
384 the subpoena are clearly inscribed. The sealed envelope
385 or wrapper shall be enclosed in an outer envelope or
386 wrapper and sealed. The outer envelope shall be addressed
387 to the clerk of the court or to the judge if there is no
388 clerk.

390 I(1)(b) The package containing records produced
391 in response to a subpoena to trial shall remain sealed and
392 shall be opened only at the time of trial at the direction
393 of the judge or with agreement of the parties. The
394 records shall be opened in the presence of all parties who
395 have appeared. Records which are not introduced in
396 evidence or required as part of the record shall be
397 returned to the custodian who submitted them.

399 I(2) *Personal attendance of records custodian.* The personal
400 attendance of a custodian of health care records and the
401 production of original health care records at a trial or
402 deposition is required if a subpoena duces tecum contains
403 the following statement:

406 The personal attendance of a custodian of health
407 care records and the production of the original
408 records are required by this subpoena. The
409 procedures authorized by section C of Rule 44 or
410 section H of this rule shall not be deemed
411 sufficient compliance with this subpoena.
412

deleted

414 ~~I(2) through I(4) unchanged~~

VERSION THREE

Draft "C" (same as Draft "A" but first opportunity to object, i.e., before service on provider and receipt of copies, is deleted) for consideration at 9-9-00 Council meeting.

Some new language (different from the draft submitted with the 8-12-00) is underlined.

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

8 **PRETRIAL DISCOVERY OF HEALTH CARE RECORDS;**
9 **PHYSICAL AND MENTAL EXAMINATION OF PERSONS;**
10 **REPORTS OF EXAMINATIONS**
11 **RULE 44**

13 A. Order for examination.

14 (text unchanged)

15 B. Report of examining physician or psychologist.

16 (text unchanged)

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

20 (delete title and text)

22 C. Health Care Records.

23 C(1) **Definitions.** As used in this rule, "health care
24 records" means medical records as defined in ORS
25 192.525(8), health care records of a health care provider
26 as defined in ORS 192.525(9) and (10), and health care
27 records of a community health program established under
28 ORS 430.610 through 430.695.

30 C(2) **Pretrial discovery of health care records from a party.**

[Dropped line]
[Dropped line]

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

33 ~~under the legal control of a party, or for damages for the~~
34 ~~death of a person whose estate is a party,~~ may obtain
35 copies of all health care records relating to the injury
36 for which recovery is sought within the scope of discovery
37 under section B of Rule 36 by either

39 C(2)(a) serving ^{damaged} a request for production for such
40 records on the ~~injured~~ party or its legal custodian or
41 guardian pursuant to Rule 43; or

43 C(2)(b) obtaining the voluntary written consent
44 to release of the records to such party from the ~~injured~~ ^{damaged}
45 party or its legal custodian or guardian before seeking
46 them from the health care provider.

48 C(3) *Pretrial discovery of health care records directly from*
49 *health care provider or facility.* Health care records within
50 the scope of discovery under section B of Rule 36 may be
51 obtained by a party against whom a civil action is filed
52 for damages ~~for injuries to the party or to a person in~~
53 ~~the custody or under the legal control of a party, or for~~
54 ~~damages for the death of a person whose estate is a party,~~
55 only by the procedure described in paragraph (2)(b) above,
56 or by the procedures described in section H of Rule 55,
57 Pretrial subpoena of health care records from health care
58 provider or facility.

to another party for injuries or death,

60 D. Report; effect of failure to comply.
61
62 (delete section entirely)

64 E. Access to hospital records.
65
66 (delete section entirely)
67

SUBPOENA
RULE 55

80 (A through G unchanged.)

82 * * * * *

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

86 H(1) [Hospital. As used in this rule, unless the context
87 requires otherwise, "hospital" means a health care facility
88 defined in ORS 442.015(14)(a) through (d) and licensed under ORS
89 441.015 through 441.097 and community health programs established
90 under ORS 430.610 through 430.695.] **Definition.** For purposes of
91 this section health care records are defined in subsection
92 C(1) of Rule 44.
93

94 H(2) **Service of subpoena and authorization.** Except when
95 it is provided with a voluntary written consent to release
96 of the health care records pursuant to paragraph (c)(2)(b)
97 of Rule 44, any party against whom a civil action is filed
98 ~~for damages for injuries to the party or to a person in~~
99 ~~the custody or under the legal control of a party, or for~~
100 ~~damages for the death of a person whose estate is a party;~~
101 may obtain copies of health care records relating to the
102 injury for which recovery is sought within the scope of
103 discovery under section B of Rule 36 directly from a
104 health care provider or facility only by serving upon the
105 party whose health care records, or whose decedent's
106 health care records are sought:

to another party for injuries or death,

108 H(2)(a) a SUBPOENA for such records directed to
109 the health care provider, accompanied by statutory witness
110 fees calculated as for a deposition at the place of
111 business of the custodian of the records, and

113 H(2)(b) simultaneously, an AUTHORIZATION TO
114 DISCLOSE HEALTH CARE RECORDS in the form provided by ORS
115 192.525(3), on which the following information has been
116 designated with reasonable particularity: the name of the
117 health care provider or providers or facility or
118 facilities from which records are sought, the categories
119 or types of records sought, and the time period,
120 treatment, or claim for which records are sought. If the
121 name of a health care provider or facility is unknown to

122 the party seeking records, they may designate "all" health
123 care providers or facilities, or "all" of them within a
124 described category. The AUTHORIZATION shall designate the
125 attorney for the party whose records are sought, or that
126 party if unrepresented, as the persons to whom the records
127 are released

129 **H(3) Return of service of subpoena and authorization;**
130 **objections.** Within 14 days after receipt of service of such
131 a SUBPOENA and AUTHORIZATION TO DISCLOSE HEALTH CARE
132 RECORDS, a party whose records are sought shall, obtain
133 the signature of a person able to consent to the release
134 of the requested records or authorized by law to obtain
135 the records, as used in ORS 192.525 (2), and a date of
136 signature, on the AUTHORIZATION and, either

137
138 H(3)(a) return it to the requesting party for its
139 use in obtaining records directly from the health
140 care provider(s) or facility or facilities,

141
142 or

144 H(3)(b) serve the SUBPOENA and AUTHORIZATION by
145 mail on the health care provider or providers or
146 facility or facilities indicated, along with the
147 STATEMENT OF INSTRUCTIONS provided in section 6
148 below; and

150 **H(4) Statement of instructions.** Along with a SUBPOENA
151 and AUTHORIZATION for health care records directly from a
152 health care provider or facility hereunder, the party
153 whose records are sought shall prepare and serve on the
154 hospital or health care provider with the AUTHORIZATION
155 the following STATEMENT OF INSTRUCTIONS:

157 H(4)(a) Enclosed with this STATEMENT OF
158 INSTRUCTIONS is a statutory SUBPOENA and AUTHORIZATION TO
159 DISCLOSE MEDICAL RECORDS pursuant to ORS 192.525(3) which
160 has been signed by a person able to consent to the release
161 of the requested records or authorized by law to obtain
162 the records. Copies of the designated records are sought
163 by each of the following parties:

165 H(4)(a)(i) (name and address of person whose
166 records are sought, or his or her attorney)

170 H(4)(a)(ii) (name and address of each other
171 party or his or her attorney who seeks access to
172 the records)

174 H(4)(b) In order to comply with this
175 Authorization and these instructions, please make ~~two~~ _____
176 copies of the designated records, place each copy in a
177 separately sealed package bearing the address and postage
178 to each of the names identified above, and place all of
179 them together in one package or shipment, and mail that
180 package within five (5) days of this date to the person
181 whose records are sought or his or her representative,
182 whose name and address are listed first above. Only
183 _____ (name of person or his or her attorney whose
184 records are sought) is authorized to receive the copies of
185 these records directly from you.

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

194 H(5) *Mode of compliance.* Health care records may be
195 obtained by subpoena pretrial only as provided in this
196 section. However, if disclosure of any requested records
197 is restricted or otherwise limited by state or federal
198 law, then the protected records shall not be disclosed in
199 response to the subpoena unless the requirements of the
200 pertinent law have been complied with and such compliance
201 is evidenced through an appropriate court order or through
202 execution of an appropriate consent. Absent such consent
203 or court order, production of the requested records not so
204 protected shall be considered production of the records
205 responsive to the subpoena. If an appropriate consent or
206 court order does accompany the subpoena, then production
207 of all records requested shall be considered production of
208 the records responsive to the subpoena.
209

210 H(5)(a) Except as provided in subsection (9) of
211 this section, when a subpoena is served upon a custodian
212 of health care records in an action in which the health
213 care provider is not a party, and the subpoena requires
214 the production of all or part of the records of the health
215 care provider relating to the care or treatment of a

216 patient of the health care provider, it is sufficient
217 compliance therewith if a custodian delivers by mail or
218 otherwise the number of true and correct copies of all the
219 records responsive to the subpoena indicated in the
220 subpoena or statement of instructions, within five days
221 after receipt thereof. Delivery shall be accompanied by
222 the affidavit described in subsection 8 of this section.
223 The copies may be photographic or microphotographic
224 reproduction.

226 **H(6) *Affidavit of custodian of records.***

228 H(6)(a) Each copy of the records described in
229 this section shall be accompanied by the affidavit of the
230 custodian of the health care provider, stating in
231 substance each of the following: (i) that the affiant is
232 a duly authorized custodian of the records and has
233 authority to certify records; (ii) that the copies are
234 true copies of all the records responsive to the subpoena;
235 (iii) that the records were prepared by the personnel of
236 the health care provider, in the ordinary course of its
237 business, at or near the time of the act, condition, or
238 event described or referred to therein.

240 H(6)(b) If the health care provider has none of
241 the records described in the subpoena, or only part
242 thereof, the affiant shall so state in the affidavit, and
243 shall send only those records of which the affiant has
244 custody.

246 H(6)(c) When more than one person has knowledge
247 of the facts required to be stated in the affidavit, more
248 than one affidavit may be made.

250 **H(7) *Personal attendance of custodian of records may be required.***

252 H(7)(a) The personal attendance of a custodian
253 of health care provider records and the production of
254 original health care provider records are required if the
255 subpoena duces tecum contains the following statement:

257

259 ~~Provider~~ The personal attendance of a custodian of health care
260 records and the production of original records *
261 are required by this subpoena. The procedure authorized
262 pursuant to Oregon Rule of Civil Procedure 55 H(7) and (8)

263 shall not be deemed sufficient compliance with this
264 subpoena.
265

267 H(7)(b) If more than one subpoena duces tecum is
268 served on a custodian of health care ~~provider~~ records and
269 personal attendance is required under each pursuant to
270 paragraph (a) of this subsection, the custodian shall be
271 deemed to be the witness of the party serving the first
272 such subpoena.

274 ~~H(8) Fees for copies. A health care provider may charge~~
275 ~~a reasonable fee for responding to a release authorization~~
276 ~~or subpoena for health care records. A reasonable fee for~~
277 ~~copying and providing such records shall not exceed~~
278 ~~twenty-five cents (\$.25) per page, less any prepaid~~
279 ~~witness fee, in the absence of personal attendance by the~~
280 ~~custodian of the records.~~

replace with
existing H(5)
Tender and
payment of
fees.

282 H(9) *Obligation of party or attorney of party whose health care*
283 *records are received from health care provider pursuant to subpoena.*

284 Upon receipt of the sealed copies of the health care
285 records addressed to each of the parties seeking access to
286 them, the party whose records are sought, or his or her
287 attorney, shall open only the copy addressed to that party
288 or attorney, and shall have 14 days in which to review
289 them. Not later than 14 days after receipt of the records
290 from the health care provider or facility, the party whose
291 records are sought shall either serve the unopened copies
292 of the records on each party seeking them, or shall serve
293 each such party with objections to their production
294 pursuant to Rule 43 B.

296 H(9)(a) *Privilege or objection log.* When a party
297 objects to the provision of health care records otherwise
298 discoverable by subpoena pursuant to this section, the
299 party shall make the objection expressly and shall
300 describe the nature of the records objected to in a manner
301 that, without revealing information which is privileged or
302 protected, will enable other parties to assess the
303 applicability of the privilege or protection.

305 H(9)(b) *Order compelling discovery.* Upon receipt of an
306 objection to all or part of a SUBPOENA and AUTHORIZATION
307 pursuant to paragraph (2)(b) above, or objection to any

308 part of the health care records sent by a provider in
309 response thereto, the party issuing the SUBPOENA and
310 AUTHORIZATION may seek an order compelling discovery,
311 pursuant to Rule 46.

313 H(9)(c) *In camera review.* In the event of a motion
314 to compel production of any health care records which have
315 been received by the party whose records are sought
316 pursuant to this section, that party shall deliver the
317 sealed copies of those records to the court for in camera
318 review within the time permitted for filing its response
319 to the motion to compel.

321 H(10) *Limited waiver of privilege.* Nothing contained in
322 this section, or in the use of the AUTHORIZATION TO
323 DISCLOSE MEDICAL RECORDS, shall constitute a waiver of any
324 common law or statutory privilege against disclosure of
325 any health care records, or any other confidential
326 communication between any party and a health care provider
327 or facility, beyond the contents of the records for which
328 disclosure is specifically authorized, and to the parties
329 to whom disclosure is specifically authorized under this
330 section.

332 H(11) *Return or destruction of records.* Any health care
333 records obtained pursuant to this section shall only be
334 used for purposes of the pending litigation. After the
335 litigation is resolved, the health care records shall be
336 either returned to the party whose records they are or
337 destroyed.

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

342 I(1) *Subpoena to trial.* Notwithstanding section H of this
343 rule, a subpoena of health care records to trial may be
344 served directly on the health care facility or its health
345 care records custodian by the party seeking the health
346 care records without an AUTHORIZATION TO DISCLOSE HEALTH
347 CARE RECORDS described in paragraph H(2)(b) of this rule
348 or a STATEMENT OF INSTRUCTIONS described in paragraph
349 H(2)(b) of this rule.

351 I(1)(a) Except as indicated in subsection (2) of
352 this section, it is sufficient compliance with such a
353 subpoena if a custodian delivers by mail or otherwise a

354 true and correct copy of all the records responsive to the
355 subpoena within five days after receipt thereof, sealed in
356 an envelope addressed to the clerk of the court where the
357 action is pending, accompanied by an affidavit described
358 in subsection H(8) of this rule. The copy may be
359 photographic or micro photographic. The copy of the
360 records shall be separately enclosed in a sealed envelope
361 or wrapper on which the title and number of the action,
362 name of the health care provider or facility, and date of
363 the subpoena are clearly inscribed. The sealed envelope
364 or wrapper shall be enclosed in an outer envelope or
365 wrapper and sealed. The outer envelope shall be addressed
366 to the clerk of the court or to the judge if there is no
367 clerk.

369 I(1)(b) The package containing records produced
370 in response to a subpoena to trial shall remain sealed and
371 shall be opened only at the time of trial at the direction
372 of the judge or with agreement of the parties. The
373 records shall be opened in the presence of all parties who
374 have appeared. Records which are not introduced in
375 evidence or required as part of the record shall be
376 returned to the custodian who submitted them.

378 I(2) *Personal attendance of records custodian.* The personal
379 attendance of a custodian of health care records and the
380 production of original health care records at a trial or
381 deposition is required if a subpoena duces tecum contains
382 the following statement:

385 The personal attendance of a custodian of health
386 care records and the production of the original
387 records are required by this subpoena. The
388 procedures authorized by section C of Rule 44 or
389 section H of this rule shall not be deemed
390 sufficient compliance with this subpoena.
391

~~deleted~~

393 ~~I(2) through I(4) unchanged~~

VERSION FOUR

Draft "D", which is a combination of Draft "B" (the same as Draft "A" except that the provider only packages two copies, one for the subpoenaing party and one for the patient, and Draft "C" (the same as Draft "A" but first opportunity to object, i.e., before service on provider and receipt of copies, is deleted) for consideration at 9-9-00 Council meeting.

Some new language (different from the draft submitted with the 8-12-00) is underlined.

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

8 **PRETRIAL DISCOVERY OF HEALTH CARE RECORDS;**
9 **PHYSICAL AND MENTAL EXAMINATION OF PERSONS;**
10 **REPORTS OF EXAMINATIONS**
11 **RULE 44**

13 A. Order for examination.

14 (text unchanged)

15 B. Report of examining physician or psychologist.

16 (text unchanged)

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

20 (delete title and text)

22 C. Health Care Records.

23 C(1) *Definitions.* As used in this rule, "health care
24 records" means medical records as defined in ORS
25 192.525(8), health care records of a health care provider
26 as defined in ORS 192.525(9) and (10), and health care
27 records of a community health program established under

28 ORS 430.610 through 430.695.

30 **C(2) Pretrial discovery of health care records from a party.**

31 Any party against whom a civil action is filed for damages
32 ~~for injuries to the party or to a person in the custody or~~
33 ~~under the legal control of a party, or for damages for the~~
34 ~~death of a person whose estate is a party,~~ may obtain
35 copies of all health care records relating to the injury
36 for which recovery is sought within the scope of discovery
37 under section B of Rule 36 by either

to another party for injuries or death,

39 C(2)(a) serving a request for production for such
40 records on the ~~injured~~ ^{damaged} party or its legal custodian or
41 guardian pursuant to Rule 43; or

43 C(2)(b) obtaining the voluntary written consent
44 to release of the records to such party from the ~~injured~~ ^{damaged}
45 party or its legal custodian or guardian before seeking
46 them from the health care provider.

48 **C(3) Pretrial discovery of health care records directly from**

49 **health care provider or facility.** Health care records within
50 the scope of discovery under section B of Rule 36 may be
51 obtained by a party against whom a civil action is filed
52 ~~for damages for injuries to the party or to a person in~~
53 ~~the custody or under the legal control of a party, or for~~
54 ~~damages for the death of a person whose estate is a party,~~
55 only by the procedure described in paragraph (2)(b) above,
56 or by the procedures described in section H of Rule 55,
57 Pretrial subpoena of health care records from health care
58 provider or facility.

to another party for injuries or death,

60 D. Report; effect of failure to comply.

61 (delete section entirely)
62

64 E. Access to hospital records.

65 (delete section entirely)
66
67

SUBPOENA
RULE 55

74
75

78 (A through G unchanged)

80 * * * * *

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

84 H(1) [**Hospital.** As used in this rule, unless the context
85 requires otherwise, "hospital" means a health care facility
86 defined in ORS 442.015(14)(a) through (d) and licensed under ORS
87 441.015 through 441.097 and community health programs established
88 under ORS 430.610 through 430.695.] **Definition.** For purposes of
89 this section health care records are defined in subsection
90 C(1) of Rule 44.
91

92 H(2) **Service of subpoena and authorization.** Except when
93 it is provided with a voluntary written consent to release
94 of the health care records pursuant to paragraph (c)(2)(b)
95 of Rule 44, any party against whom a civil action is filed
96 for damages ~~for injuries to the party or to a person in~~
97 ~~the custody or under the legal control of a party, or for~~
98 ~~damages for the death of a person whose estate is a party,~~
99 may obtain copies of health care records relating to the
100 injury for which recovery is sought within the scope of
101 discovery under section B of Rule 36 directly from a
102 health care provider or facility only by serving upon the
103 party whose health care records, or whose decedent's
104 health care records are sought:

to another party for injuries or death,

106 H(2)(a) a SUBPOENA for such records directed to
107 the health care provider, accompanied by statutory witness
108 fees calculated as for a deposition at the place of
109 business of the custodian of the records, and

111 H(2)(b) simultaneously, an AUTHORIZATION TO
112 DISCLOSE HEALTH CARE RECORDS in the form provided by ORS
113 192.525(3), on which the following information has been
114 designated with reasonable particularity: the name of the
115 health care provider or providers or facility or
116 facilities from which records are sought, the categories
117 or types of records sought, and the time period,
118 treatment, or claim for which records are sought. If the
119 name of a health care provider or facility is unknown to
120 the party seeking records, they may designate "all" health
121 care providers or facilities, or "all" of them within a
122 described category. The AUTHORIZATION shall designate the

123 attorney for the party whose records are sought, or that
124 party if unrepresented, as the persons to whom the records
125 are released.

127 **H(3) Return of service of subpoena and authorization;**
128 **objections.** Within 14 days after receipt of service of such
129 a SUBPOENA and AUTHORIZATION TO DISCLOSE HEALTH CARE
130 RECORDS, a party whose records are sought shall, obtain
131 the signature of a person able to consent to the release
132 of the requested records or authorized by law to obtain
133 the records, as used in ORS 192.525 (2), and a date of
134 signature, on the AUTHORIZATION and, either

135
136 H(3)(a) return it to the requesting party for its
137 use in obtaining records directly from the health
138 care provider(s) or facility or facilities,

139
140 or

142 H(3)(b) serve the SUBPOENA and AUTHORIZATION by
143 mail on the health care provider or providers or
144 facility or facilities indicated, along with the
145 STATEMENT OF INSTRUCTIONS provided in section 6
146 below; and

148 **H(4) Statement of instructions.** Along with a SUBPOENA
149 and AUTHORIZATION for health care records directly from a
150 health care provider or facility hereunder, the party
151 whose records are sought shall prepare and serve on the
152 hospital or health care provider with the AUTHORIZATION
153 the following STATEMENT OF INSTRUCTIONS:

155 H(4)(a) Enclosed with this STATEMENT OF
156 INSTRUCTIONS is a statutory SUBPOENA and AUTHORIZATION TO
157 DISCLOSE MEDICAL RECORDS pursuant to ORS 192.525(3) which
158 has been signed by a person able to consent to the release
159 of the requested records or authorized by law to obtain
160 the records. Copies of the designated records are sought
161 by each of the following parties:

163 H(4)(a)(i) (name and address of person whose
164 records are sought, or his or her attorney)

166 H(4)(a)(ii) (name and address of ~~each other~~ ^{the}
167 party or his or her attorney who seeks access to
168 the records)

170 H(4)(b) In order to comply with this
171 Authorization and these instructions, please make two

172 copies of the designated records, place each copy in a
173 separately sealed package bearing the address and postage ^{each}
174 to each of the names identified above, and place ~~all~~ of
175 them together in one package or shipment, and mail that
176 package within five (5) days of this date to the person
177 whose records are sought or his or her representative,
178 whose name and address are listed first above. Only
179 _____ (name of person or his or her attorney whose
180 records are sought) is authorized to receive the copies of
181 these records directly from you.

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

190 H(5) *Mode of compliance.* Health care records may be
191 obtained by subpoena pretrial only as provided in this
192 section. However, if disclosure of any requested records
193 is restricted or otherwise limited by state or federal
194 law, then the protected records shall not be disclosed in
195 response to the subpoena unless the requirements of the
196 pertinent law have been complied with and such compliance
197 is evidenced through an appropriate court order or through
198 execution of an appropriate consent. Absent such consent
199 or court order, production of the requested records not so
200 protected shall be considered production of the records
201 responsive to the subpoena. If an appropriate consent or
202 court order does accompany the subpoena, then production
203 of all records requested shall be considered production of
204 the records responsive to the subpoena.
205

206 H(5)(a) Except as provided in subsection (9) of
207 this section, when a subpoena is served upon a custodian
208 of health care records in an action in which the health
209 care provider is not a party, and the subpoena requires
210 the production of all or part of the records of the health
211 care provider relating to the care or treatment of a
212 patient of the health care provider, it is sufficient
213 compliance therewith if a custodian delivers by mail or
214 otherwise the number of true and correct copies of all the
215 records responsive to the subpoena indicated in the
216 subpoena or statement of instructions, within five days
217 after receipt thereof. Delivery shall be accompanied by
218 the affidavit described in subsection 8 of this section.
219 The copies may be photographic or microphotographic
220 reproduction.

222 H(6) *Affidavit of custodian of records.*

224 H(6)(a) Each copy of the records described in
225 this section shall be accompanied by the affidavit of the
226 custodian of the health care provider, stating in
227 substance each of the following: (i) that the affiant is
228 a duly authorized custodian of the records and has
229 authority to certify records; (ii) that the copies are
230 true copies of all the records responsive to the subpoena;
231 (iii) that the records were prepared by the personnel of
232 the health care provider, in the ordinary course of its
233 business, at or near the time of the act, condition, or
234 event described or referred to therein.
235

236 H(6)(b) If the health care provider has none of
237 the records described in the subpoena, or only part
238 thereof, the affiant shall so state in the affidavit, and
239 shall send only those records of which the affiant has
240 custody.

242 H(6)(c) When more than one person has knowledge
243 of the facts required to be stated in the affidavit, more
244 than one affidavit may be made.

246 H(7) *Personal attendance of custodian of records may be required.*

248 H(7)(a) The personal attendance of a custodian
249 of health care provider records and the production of
250 original health care provider records are required if the
251 subpoena duces tecum contains the following statement:

253 -----
255 The personal attendance of a custodian of health care
256 ~~provider~~ records and the production of original records *
257 are required by this subpoena. The procedure authorized
258 pursuant to Oregon Rule of Civil Procedure 55 H(7) and (8)
259 shall not be deemed sufficient compliance with this
260 subpoena.
261 -----

263 H(7)(b) If more than one subpoena duces tecum is
264 served on a custodian of health care ~~provider~~ records and
265 personal attendance is required under each pursuant to
266 paragraph (a) of this subsection, the custodian shall be
267 deemed to be the witness of the party serving the first
268 such subpoena.

270 H(8) ~~Fees for copies.~~ A health care provider may charge
271 a reasonable fee for responding to a release authorization
272 or subpoena for health care records. A reasonable fee for
273 copying and providing such records shall not exceed
274 twenty-five cents (\$0.25) per page, less any prepaid
275 witness fee, in the absence of personal attendance by the
276 custodian of the records.

replace with
existing H(5)
Tender and
payment of
fees.

278 H(9) *Obligation of party or attorney of party whose health care*
279 *records are received from health care provider pursuant to subpoena.*
280 Upon receipt of the sealed copies of the health care
281 records addressed to ~~each of the parties~~ ^{party} seeking access to
282 them, the party whose records are sought, or his or her
283 attorney, shall open only the copy addressed to that party
284 or attorney, and shall have 14 days in which to review
285 them. Not later than 14 days after receipt of the records
286 from the health care provider or facility, the party whose
287 records are sought shall either serve the unopened ~~copies~~ ^{COPY}
288 of the records on ~~each~~ ^{the} party seeking them, or shall serve
289 ~~each~~ such party with objections to their production
290 pursuant to Rule 43 B.

292 H(9)(a) *Privilege or objection log.* When a party
293 objects to the provision of health care records otherwise
294 discoverable by subpoena pursuant to this section, the
295 party shall make the objection expressly and shall
296 describe the nature of the records objected to in a manner
297 that, without revealing information which is privileged or
298 protected, will enable other parties to assess the
299 applicability of the privilege or protection.

301 H(9)(b) *Order compelling discovery.* Upon receipt of
302 an objection to all or part of a SUBPOENA and
303 AUTHORIZATION pursuant to paragraph (2)(b) above, or
304 objection to any part of the health care records sent by a
305 provider in response thereto, the party issuing the
306 SUBPOENA and AUTHORIZATION may seek an order compelling
307 discovery, pursuant to Rule 46.

309 H(9)(c) *In camera review.* In the event of a motion
310 to compel production of any health care records which have
311 been received by the party whose records are sought
312 pursuant to this section, that party shall deliver the
313 sealed ~~copies~~ of those records to the court for *in camera*
314 review within the time permitted for filing its response
315 to the motion to compel.

copy

317 H(10) *Limited waiver of privilege.* Nothing contained in
318 this section, or in the use of the AUTHORIZATION TO
319 DISCLOSE MEDICAL RECORDS, shall constitute a waiver of any
320 common law or statutory privilege against disclosure of
321 any health care records, or any other confidential
322 communication between any party and a health care provider
323 or facility, beyond the contents of the records for which
324 disclosure is specifically authorized, and to the parties
325 to whom disclosure is specifically authorized under this
326 section.

328 H(11) *Return or destruction of records.* Any health care
329 records obtained pursuant to this section shall only be
330 used for purposes of the pending litigation. After the
331 litigation is resolved, the health care records shall be
332 either returned to the party whose records they are or
333 destroyed.

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

338 I(1) *Subpoena to trial.* Notwithstanding section H of this
339 rule, a subpoena of health care records to trial may be
340 served directly on the health care facility or its health
341 care records custodian by the party seeking the health
342 care records without an AUTHORIZATION TO DISCLOSE HEALTH
343 CARE RECORDS described in paragraph H(2)(b) of this rule
344 or a STATEMENT OF INSTRUCTIONS described in paragraph
345 H(2)(b) of this rule.

347 I(1)(a) Except as indicated in subsection (2) of
348 this section, it is sufficient compliance with such a
349 subpoena if a custodian delivers by mail or otherwise a
350 true and correct copy of all the records responsive to the
351 subpoena within five days after receipt thereof, sealed in
352 an envelope addressed to the clerk of the court where the
353 action is pending, accompanied by an affidavit described
354 in subsection H(8) of this rule. The copy may be
355 photographic or micro photographic. The copy of the
356 records shall be separately enclosed in a sealed envelope
357 or wrapper on which the title and number of the action,
358 name of the health care provider or facility, and date of
359 the subpoena are clearly inscribed. The sealed envelope
360 or wrapper shall be enclosed in an outer envelope or
361 wrapper and sealed. The outer envelope shall be addressed
362 to the clerk of the court or to the judge if there is no
363 clerk.

35 I(1)(b) The package containing records produced

366 in response to a subpoena to trial shall remain sealed and
367 shall be opened only at the time of trial at the direction
368 of the judge or with agreement of the parties. The
369 records shall be opened in the presence of all parties who
370 have appeared. Records which are not introduced in
371 evidence or required as part of the record shall be
372 returned to the custodian who submitted them.

374 I(2) *Personal attendance of records custodian.* The personal
375 attendance of a custodian of health care records and the
376 production of original health care records at a trial or
377 deposition is required if a subpoena duces tecum contains
378 the following statement:

381 The personal attendance of a custodian of health
382 care records and the production of the original
383 records are required by this subpoena. The
384 procedures authorized by section C of Rule 44 or
385 section H of this rule shall not be deemed
386 sufficient compliance with this subpoena.
387

deleted

~~I(2) through I(4) unchanged~~