COUNCIL ON COURT PROCEDURES
Minutes of Meeting of December 9, 2000
5200 Southwest Meadows Road
Oregon State Bar Center
Lake Oswego, Oregon

Present:

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

NOTE: Judge Carp attended the meeting via speaker telephone.

Visitors: Mr. Don Corson, Attorney, Eugene, was a guest at the meeting representing the Oregon Trial Lawyers' Association (OTLA), together with other representatives of OTLA. 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 minutes of September 9, 2000 Council meeting. The following correction was made to these minutes as distributed: On page 3, in the first line of the first full paragraph delete "in cases in Washington State where . . ." and substitute "in cases in which he was the attorney for the plaintiff-examinee . . ." Also Judges Carp and Rasmussen asked that the minutes show that they were among the four members who voted in opposition to the motion to adopt the Rule 58 amendments recorded on page 8. With these changes the minutes were approved.

Agenda Item 3: Proposed amendments to the Oregon Rules of Civil Procedure (ORCP) (attached to agenda of this meeting) (Mr. Alexander).

Items 3a, 3b, 3c, and 3g: Proposed amendments to ORCP 7, 21, 32, and 58 (see attachment to the agenda of this meeting). Judge Rasmussen, seconded by Judge Marcus, offered a motion to promulgate the amendments to Rules 7, 21, 32, and 58 as shown in the attachment to the agenda of this meeting. After brief discussion, this motion was agreed to, 19 members voting in favor and one opposed. Judge Barron stated that he wished the minutes to show that his opposition to this motion was based on objections he had to some of the proposed amendments to Rule 58.

Item 4: Requested amendment to ORS 1.735(2) to modify the "exact language" requirement (attached to the agenda of 10-13-01 meeting) (out of order). Mr. Alexander noted that this requested statutory amendment had been approved at a previous Council meeting, and that he would write to the chairs of the judiciary committees about this request and would try to obtain a legislator-sponsor. Judge Harris commented that someone from the Council should be tasked with making sure that this bill makes it through the legislative process and does not get lost in the shuffle. Prof. Holland said that he would ask Bob Oleson of the Oregon State Bar to do what he could to lobby for passage of this bill. Mr. McMillan offered a motion, duly seconded, that this matter be left to the discretion of the Chair, which motion was unanimously agreed to.

Item 3f: Proposed amendments to ORCP 44 C and 55 F (see attachment to the agenda of this meeting) (Mr. Gaylord). Mr. Gaylord recapitulated the history of these proposed amendments and the many difficulties that had been encountered, some of which he stated had been resolved, but others remained unresolved. He asked that a written statement he had prepared be filed with the minutes of this meeting, which was done (see attachment to agenda of 10-13-01 meeting). He added that he believed there still remained too much controversy and opposition to these proposed amendments for them to be promulgated at this time.

Mr. Gaylord urged that an interim subcommittee of the Council be constituted for the purpose of seeing what could be done before the next biennium to respond to some of the opposition these proposed amendments had engendered. He added suggestions that this subcommittee not necessarily be limited to Council members, but should include representatives of the major interests groups, including OTLA, OADC, the Oregon Hospital Association, and the Oregon Medical Association, and that consideration be given to having a judicial member of the Council chair this subcommittee.

He concluded by offering a motion to table these proposed amendments, which motion was seconded by Ms. Clarke. This motion was agreed to, 20 members voting in favor and one opposed. Judge Carp stated that Mr. Gaylord should be commended for his statesmanship in

withdrawing these proposals at this time. Judge Marcus commented that he believed many favored a simpler set of amendments. Prof. Holland suggested that an effort be made to see how the U.S. District Court for the District of Oregon, as well as discovery rules of other states, deal with the problems associated with discovery of medical and hospital records.

Items 3d and 3e: Proposed amendments to ORCP 44 A and 46 B (see attachment to the agenda of this meeting) (Mr. Alexander). There was a lengthy discussion concerning the relative merits and demerits of Alternatives One, Two, and Three. Mr. Gaylord stated that, generally speaking, the plaintiffs bar supported only Alternative One and was opposed to Alternatives Two and Three. He added that this was also his own position.

Justice Durham commented that his attention had been drawn to these issues, not by any belief that abuses were occurring in connection with court-order medical examinations, but because he thought that many trial judges, especially in Multnomah County, where the previous motion panel guidelines have been withdrawn, now wished the Council to provide greater direction with respect to whether and how examinations would be recorded and the circumstances, if any, where a plaintiff-examinee's counsel or other representative could be present during examinations. He added that the present situation is one of unguided judicial discretion exercised by individual trial judges. He further commented that he favored Alternative One because it represented a compromise position and also was a modest initial step toward achieving greater statewide consistency in how these matters are ruled on while not depriving trial judges of their appropriate discretion.

Mr. Spooner noted that positions had indeed evolved in the course of considering and drafting these alternative proposals. He added that he thought Alternative Two was the best among the present alternatives because it provided sanctions for disrupting examinations and also for the making of records of examinations. He further added that he thought the plaintiffs bar had exaggerated the problem of improper questioning of examinees by examiners in an effort to get a major change in long-established practice adopted.

Mr. Gaylord responded that the documented experience in Washington State showed that serious problems relating to court-order medical examinations do in fact exist. He also observed that the Washington counterpart of ORCP 44 C, which is identical to Alternative One, has worked well and has not generated any reported problems. He concluded by saying that he thought this is a matter that has been presented to the Council to deal with, and that it was its responsibility to do so.

Judge Isaacson raised the question as to whether, if one of these alternatives is promulgated, it would override the ethical prohibition against contact by a lawyer or agent of a lawyer with an opposing litigant. Judge Marcus responded that he did not think any of the alternatives would change the ethical situation one way or the other.

Following a short break, Judge Marcus, seconded by Ms. Clarke, offered a motion to promulgate Alternative One. This motion was not agreed to, 14 members voting in favor and 8 members opposed. Mr. Spooner, seconded by Judge Coon, offered a motion to promulgate Alternative Two. This motion was not agreed to, 10 members voting in favor and 12 opposed.

Discussion of this item concluded by Justice Durham saying that he wished to acknowledge the good work of Ms Clarke and Mr. Spooner in connection with this project.

Agenda Item 5: Suggestions regarding Staff Comments (Mr. Alexander). Mr. Alexander noted that most of the Staff Comments prepared by Prof. Holland related to proposed amendments that were not approved for promulgation. There was some discussion as to which, if any, other Staff Comments should be published, in particular what the Comment to the Rule 58 amendments should say about trial judges' discretion to permit oral juror questions. The consensus of the members was that no Staff Comments should be published respecting the Rule 7 and Rule 58 amendments, but that the one prepared by Prof. Holland should be published respecting the Rule 21 amendment.

Agenda Item 6: Discussion regarding the proposed Oregon Rules of Juvenile Court Procedure (ORJCP) (Prof. Holland). Prof. Holland explained that the proposed ORJCP had been prepared by the Oregon Law Commission for submission to the 2001 Legislature. He further explained that Rep. Lane Shetterly, who is the Chair of the Commission, has asked that the Council consider whether it was in a position appropriately to undertake the same responsibility respecting the ORJCP, assuming the latter are enacted by the Legislature, as it has with regard to the ORCP; that is, to keep the ORJCP up to date and propose amendments to them from time to time as needed.

Mr. Alexander stated his concern that, if the Council were to assume ongoing responsibility for the ORJCP, some number of new members with expertise in juvenile justice would have to be added to the Council's membership, those new members would probably come to constitute a separate committee composed of people with little or no interest in the ORCP. Justice Durham commented that, if this new function is going to be undertaken by the Council, the impetus should come from the Legislature and the Council should take not take the initiative by in effect asking for this additional assignment. The consensus of the members was that adding the proposed ORJCP to the Council's responsibility was not something the Council should in effect request be done.

Agenda Item 7: Election of year 2001 officers (Mr. Alexander). Judge Marcus offered a motion, duly seconded, that the existing officers of the Council be reappointed for the year 2001, they being Mr. Alexander as Chair, Mr. Spooner as Vice Chair, and Mr. McMillan as Treasurer. This motion was unanimously agreed to. Mr. Gaylord then offered a motion,

seconded by Ms. Clarke, that nominations be closed, which was unanimously agreed to. Thus Mr. Alexander, Mr. Spooner, and Mr. McMillan were elected officers of the Council for the year 2001. It was noted with regret that neither Mr. Alexander nor Mr. McMillan will be Council members after the expiration of their terms on August 31, 2001, following which Mr. Spooner will, in accordance with the Council's Rules of Procedure, become Acting Chair pending election of officers for the year 2002 at the January 2002 meeting.

Agenda Item 8: Election of Legislative Advisory Committee (LAC) for the 2001 Legislative Assembly (Mr. Alexander). The following members were unanimously elected members of the 2001 LAC: Judge Dickey, Mr. Gayord, Judge Linder, Mr. McMillan, and Mr. Spooner.

Agenda Item 9: Old business. No item of old business was raised.

Agenda Item 10: New business. Judge Rasmussen moved a vote of thanks for the dedicated work and contributions to the Council on the part of all members whose terms would expire prior to its next meeting in October, 2001. This was unanimously agreed to. Mr. McMillan commented that, as a non-lawyer and the public member, he had been enormously impressed by the seriousness with which the Council undertook its responsibilities and by the consistent quality of effort on the part of all members.

Prof. Holland reminded practitioner members whose first terms would expire on August 31, 2001 and were hence eligible for reappointment to a second term that, if they wished to serve a second term, they should make their wish known to the OSB Board of Governors, since in recent years reappointment to second terms has by no means been automatic.

Agenda Item 11: Adjournment. Without objection Mr. Alexander declared the meeting adjourned at 11:46 a.m.

Respectfully submitted,

Maury Holland
Executive Director

Report and Comments re Rule 44/55 proposal

Bill Gaylord

12/9/00

1. History

The issues addressed by these proposed changes were first presented to the Council in 1996 during my year as chair. The impetus for change came from each of the interest groups involved in the exchange of medical records in litigation:

1) defense bar complaints about not being able to be sure they were receiving the full medical records, and that no two sets of supposedly the same records from the same provider ever turned out to be identical;

2) medical providers complaining that they were being oppressed with numerous and repetitious requests or subpoenas for the same medical records, and that they were constantly confused about which rules applied to their conduct because of irrationally different rules in e.g. ORCP 55H and 55I for hospital records versus medical office records, and further confused by the obligations they have to honor certain federal restrictions on disclosures of e.g. drug records, mental health records, and AIDS testing records; and

3) plaintiff's lawyers complaining that they were being required provide medical records to the defense first by responses to requests for production under ORCP 43, then all over again at considerable expense and time, through multiple subpoenas to providers; and that patients were giving de facto waivers of their medical privileges and valid objections to the scope of discovery of such records when they were put in the hands of defendants counsel before plaintiffs had sufficient opportunity to examine the subpoena or the records.

In response to these outcries, with full Council approval, I appointed a subcommittee of council members, chaired by Judge Anna Brown, to study and propose alternative ways to accomplish the exchange of medical records, and solve some or all of these complaints. I also served as a member of this subcommittee from its inception, along with two members of the defense bar, and a health care lawyer representing medical providers. The subcommittee met several times during the first three years of its existence under the leadership of Judge Brown. During that time,

BASIC FRAMEWORK OF THE CURRENT PROPOSED NEW RULES WERE PTED WITHOUT OPPOSITION AMONG THE SUBCOMMITTEE MEMBERS. URING THE 1998 SESSION OF THE COUNCIL, JUDGE BROWN REPORTED ON HE SUBCOMMITTEE'S WORKING CONCEPTS, AND IT WAS CLEAR TO THE OUNCIL THAT THE SUBJECT WAS PREMATURE FOR COUNCIL ACTION. ETAILS OF DRAFT LANGUAGE TO CARRY OUT AGREED GOALS AND METHODS IF THE SUBCOMMITTEE WERE STILL BEING WORKED ON WHEN JUDGE BROWN EFT THE COUNCIL IN 1999 DUE TO HER APPOINTMENT TO THE FEDERAL OURT.

MEANWHILE, APPROXIMATELY A YEAR PASSED WHILE THE COUNCIL WAS UT OF SESSION, AND NO FULL SUBCOMMITTEE MEETINGS TOOK PLACE BECAUSE THERE WAS NO NEW DRAFT OF THE RULES FOR REVIEW OR DISCUSSION. BY THAT TIME I HAD BECOME BY DEFAULT THE UNOFFICIAL SCRIVENER OF THE SUBCOMMITTEE. IN THAT ROLE DURING THE 1999 BY-YEAR, I MET WITH JUDGE BROWN SEVERAL TIMES AT HER REQUEST, SO THAT SHE AND I COULD RECONSTRUCT THE STATE OF THE DRAFT RULES, AND USING HER NOTES FROM EARLIER MEETINGS, PUT THE REST OF THE STRUCTURAL PIECES TOGETHER SO THAT THE DRAFT RULES WOULD COVER ALL THE NECESSARY SUBJECTS THAT WE HAD IDENTIFIED. WITH HER APPROVAL, I THEN PRESENTED THE COMPLETE-TO-DATE (BUT NOT YET FINAL) DRAFT OF THE SUBCOMMITTEE'S WORK TO BOTH THE NEWLY AUTHORIZED AND RE-POPULATED SUBCOMMITTEE AND THE FULL COUNCIL SOMETIME EARLY THIS YEAR.

THE CURRENT SUBCOMMITTEE THEN MET SEVERAL TIMES IN THE PRING, WORKED OUT REMAINING DETAILS OF THE DRAFT, AND WITH THE OUNCIL'S APPROVAL, DISSEMINATED THE DRAFT TO OBVIOUS INTERESTED PARTIES FOR THEIR INPUT. THAT PROCESS LED TO COMMENTS RECEIVED IN WRITING FROM MEMBERS OF THE DEFENSE BAR, THE OREGON MEDICAL ASSOCIATION, AND THE OREGON HOSPITAL ASSOCIATION, FOLLOWED BY SUBCOMMITTEE MEETINGS ATTENDED BY REPRESENTATIVES OF EACH OF THOSE GROUPS. FROM THAT PROCESS WE IDENTIFIED POINTS OF CONTENTION, PRIMARILY BETWEEN DEFENSE LAWYERS AND MEDICAL PROVIDERS, OVER WHICH WAS THE BEST ALTERNATIVE AMONG THREE DIFFERENT POSSIBLE VERSION OF THE RULES. THESE CHOICES DIFFERED ONLY WITH RESPECT TO 1) WHETHER THE PATIENT WOULD HAVE TWO OPPORTUNITIES OR ONLY ONE TO OBJECT TO THE SCOPE AND TO RAISE PRIVILEGE ISSUES BEFORE THE RECORDS WERE PROVIDED TO DEFENSE COUNSEL, AND 2) WHETHER OR NOT THE RULES WOULD ENCOURAGE MULTIPLE PARTIES TO JOIN IN A SINGLE SUBPOENA TO PERMIT/REQUIRE MEDICAL PROVIDERS TO PACKAGE AND MAIL COPIES OF THE RECORDS FOR EACH OF THEM.

THESE ISSUES WERE ALL RESOLVED BY THE COUNCIL IN FAVOR OF GIVING THE DEFENSE BAR ITS PREFERENCES, AT OUR SEPTEMBER MEETING WHEN WE VOTED TO PUBLISH ONLY THE VERSION OF RULE CHANGES NOW BEFORE US.

2, CURRENT STATUS

SINCE THE SEPTEMBER MEETING, I HAVE LEARNED THAT THE OADC HAS DECIDED NOT TO PARTICIPATE ANY FURTHER IN THIS EFFORT TO IMPROVE

N AND STANDARDIZE THE METHODS AVAILABLE FOR THEIR ACQUISITION
MEDICAL RECORDS. I HAVE BEEN ADVISED IN CLEAR TERMS THAT IT IS HEIR WISH TO REPLACE DECADES OF OREGON STATUTORY AND CASE LAW /ITH AN AUTOMATIC WAIVER OF ALL PHYSICIAN-PATIENT PRIVILEGES WHEN NY LAWSUIT FOR PERSONAL INJURY IS FILED. THEY INTEND TO TAKE THIS OSITION BEFORE THE OREGON LEGISLATURE IN THE SPRING AND SEE IF HEY HAVE THE POLITICAL POWER TO DO THIS TO OREGON LITIGANTS, OURTS AND MEDICAL PROVIDERS.

AT THE SAME TIME, THERE HAVE BEEN RUMBLINGS OF CONCERN FROM A FEW PLAINTIFF'S LAWYERS ABOUT THE PRACTICAL EFFECTS OF THE PROPOSED NEW RULES. I HAVE NOT HEARD FROM REPRESENTATIVES OF THE OMA ABOUT THEIR FINAL POSITION ON THESE IDEAS, BUT THEY HAD BEEN LUKEWARM AT BEST, FOR REASONS MENTIONED ABOVE. I BELIEVE THEY ARE LESS CONCERNED NOW THAN ORIGINALLY THAT THIS PROPOSAL WOULD INCREASE THE BURDEN ON THEM TO MAKE AND SEND COPIES OF RECORDS, BUT THEY REMAIN UNHAPPY ABOUT THE FACT THAT WE DELETED THE OPPORTUNITY FOR PATIENTS' LAWYERS TO OBJECT TO THE SCOPE AND PRIVILEGES BEFORE THEY ARE REQUIRED TO PRODUCE AND PACKAGE THE COPIES.

IN ADDITION, I HAVE RECEIVED A SPECIFIC QUESTION/OBJECTION FROM GWEN DAYTON, LAWYER FOR THE OHA, TO THE FACT THAT THE INSTRUCTION SHEET TO BE SENT TO MEDICAL PROVIDERS WITH THE SUBPOENA FORWARDED BY THE PATIENT'S LAWYER, IS NOT MENTIONED FOR INCLUSION WITH A SUBPOENA SENT DIRECTLY BY THE DEFENSE LAWYER. THEY THINK THE NSTRUCTION SHEET IS A GOOD IDEA, AND SHOULD BE REQUIRED NO MATTER WHO SERVES A SUBPOENA. I ADMIT THAT THIS IS A DIFFERENCE THAT WAS UNNOTICED IN THE DRAFTING AND DISCUSSION ABOUT THE RULES, AND PROBABLY SHOULD BE UNIFORM REGARDLESS WHOSE SUBPOENA IT IS. THERE MAY BE OTHER GLITCHES AS YET UNFOUND IN THE PROVISIONS OF THESE RULES, AND I AM MORE THAN A LITTLE UNCOMFORTABLE WITH THE STATE OF FINISH ON WHAT YOU HAVE BEFORE YOU. I DON'T SUGGEST THAT IT IS SO FAR FROM DONE THAT IT COULDN'T BE PASSED AND PUT TO USE, BUT IT ALSO COULD BE BETTER, AND PROBABLY SHOULD BE IN LIGHT OF THE LEVEL OF AMBIVALENCE AND OPPOSITION TOWARD IT TO DATE.

3. Conclusion

I DO NOT BELIEVE WE COULD CONSIDER OUR WORK ON THIS SUBJECT AREA DONE AT THE END OF THIS SESSION EVEN IF WE PASSED THE PRESENT PROPOSAL WITH THE REQUISITE 15 VOTES. MOREOVER, LACKING SUPPORT FROM THE OADC MEMBERS OF THIS COUNCIL, I DOUBT WE CAN OBTAIN THE VOTES TO PASS IT. FRANKLY, I FEAR THAT TRYING AND FAILING TO PASS THIS PACKAGE OF CHANGES WOULD RESULT IN A GREATER THREAT TO OUR FUTURE ABILITY TO MAKE A GOOD SOLUTION THAN LEAVING THE WHOLE SUBJECT ON THE TABLE FOR FURTHER WORK, PREFERABLY WITH SOME NEW BLOOD, BY AT LEAST ONE MORE SEASON OF THIS COUNCIL. WITH ALL DUE RESPECT TO OUR OADC COLLEAGUES AND THEIR AMBITIOUS POLITICAL AGENDAS, I FIRMLY BELIEVE THIS IS SOMETHING BETTER DONE BY CAREFUL COOPERATIVE WORK WITH ALL THE INTERESTED GROUPS REPRESENTED UNDER THE GUIDANCE OF A WELL CREDENTIALED MEMBER OF THIS COUNCIL,

THAN BY ANY PART OF THE ELECTED LEGISLATURE, ESPECIALLY IN THIS ERA OF SO FEW LAWYER-LEGISLATORS AND SO MUCH INEXPERIENCE BUILT INTO THE HALLS OF SALEM.

I WILL THEREFORE, IN A MINUTE, MOVE TO TABLE THE SUBJECT OF CHANGES TO ORCP 44 AND 55 DEALING WITH MEDICAL RECORDS SUBPOENAS. FIRST, I WANT TO EXPLAIN THE REST OF MY MOTION BEFORE I MAKE IT.

I BELIEVE THE COUNCIL SHOULD RE-COMMISSION A SUBCOMMITTEE TO CONTINUE TO WORK ON THIS SET OF RELATED ISSUES, AND TO ENTERTAIN ANY AND ALL IDEAS FOR HOW TO STREAMLINE, SIMPLIFY, AND IMPROVE THE PROCESSES WE USE FOR PRODUCTION OF MEDICAL RECORDS IN LITIGATION, AND TO PRESERVE AND ENHANCE THE SYSTEMATIC RECOGNITION AND ENFORCEMENT OF CONFIDENTIALITY, CONSISTENT WITH A REASONABLE SCOPE OF DISCOVERY OF MATTERS RELATED TO AN INJURY FOR WHICH RECOVERY IS SOUGHT. I BELIEVE THE NEW SUBCOMMITTEE SHOULD BE CONSTITUTED WITHOUT LIMITATION TO COUNCIL MEMBERSHIP, SO THAT THE OBVIOUS INTEREST GROUPS ARE EACH WELL REPRESENTED. FOR EXAMPLE, I WOULD LIKE TO SEE A MEMBER OF THE EXECUTIVE COMMITTEE OF OADC ASKED TO SERVE, AS WELL AS GWEN DAYTON FOR THE OHA, TOM COONEY THE YOUNGER FOR OMA, AND SOMEONE LIKE ROBERT NEURBERGER OR ANOTHER SEASONED PERSON FOR OTLA. I BELIEVE THE CHAIRSHIP OF THE SUBCOMMITTEE SHOULD BE TAKEN OVER BY A JUDICIAL MEMBER OF THIS COUNCIL. I BELIEVE SUCH SUBCOMMITTEE SHOULD BE ASKED TO COMMIT ITSELF TO REPORTING A PROPOSAL TO THE NEXT SESSION OF THE COUNCIL EARLY IN ITS SEASON, SO THAT A FULL DISCUSSION OF THE IDEAS CAN BE HAD WITHIN THE FULL COUNCIL.

I WOULD BE HAPPY TO ACT AS A LIAISON TO A NEW SUBCOMMITTEE LONG ENOUGH TO TURN OVER AND EXPLAIN THE HISTORICAL FILES IN MY POSSESSION, BUT I DON'T WANT TO BE ENGAGED IN THE DEBATE BEYOND THAT. LET ME CLARIFY THAT I AM NOT AT ALL UPSET WITH MY OWN CONCLUSION THAT THIS WORK IS NOT DONE, NOR DO I REGRET THE WORK THAT MY FELLOW SUBCOMMITTEE MEMBERS AND I HAVE DONE. I AM A LITTLE TIRED OF IT, AND GLAD TO THINK IT MIGHT BE CARRIED ON WITH NEW INTEREST AND NEW PEOPLE. THAT'S NOT TO SAY I AM PLEASED AT THE SPECTRE OF OUR OADC COLLEAGUES ABANDONING THIS ORDERLY AND LAWYERLY WAY OF WORKING FOR USEFUL IMPROVEMENT OF THE RULES IN FAVOR OF A WHAT IS LIKELY TO BE A BLOODY DISPUTE IN A MUCH LESS CONSTRUCTIVE SETTING FOR THE SAKE OF A VERY DIVISIVE AND REACTIONARY GOAL.

THEREFORE, I MOVE TO TABLE ORCP 44 AND 55 CHANGES, AND THAT THE CHAIR APPOINT A NEW SUBCOMMITTEE TO STUDY THESE ISSUES AND PREPARE A REPORT OF ANY NEW DRAFT RULES TO THE COUNCIL NOT LATER THAN JANUARY 15, 2002.

Attachment A to 10-13-01 Meeting Agenda

Summary of 2001 Legislative Assembly

1. Funding. Without any difficulty or resistance the Council was refunded for the 2001-03 biennium at nearly the same level as in recent past biennia. Ralph Spooner and I testified on the budget request before the joint subcommittee of Ways & Means, and got not even a single hostile question.

2. HB 3251 to amend ORS 1.735(2) to modify the "exact language" requirement. This bill failed of passage in the Senate and thus did not become law. I testified in support of the bill before a House Committee (a summary of my testimony is attached)--there was no testimony in opposition--and the Committee voted unanimously "do pass." It was subsequently voted on favorably by the full House. But it was never called for hearing by the Senate, and seems to have gotten "lost in the shuffle" near the end of the session. As far as I could tell there was no opposition on the merits of this bill on the part of any legislator. Perhaps we should try again in 2003.

3. ORCP amendments promulgated by the Council at its 12-9-00 meeting. None of the 2000 amendments, effective Jan. 1, 2002, was disallowed or modified by the Legislature.

4. ORCP amendments by the 2001 Legislative Assembly:

a. ORCP 55 H(1) was amended effective 1-1-02 by OR LAWS 2001, c. 104, §3 as follows (**matter added in bold underlined**; *deleted italicized enclosed in square brackets*[ ]):

> **"H Hospital records.**
>
> "H(1) Hospital. As used in this rule, unless the context requires otherwise, 'hospital' means a [*health care facility*] **hospital, as** defined in ORS 442.015 [*14(a) through (d) and*] **(19), or a long term care facility or an ambulatory surgical center, as those terms are defined in ORS 442.015, that is** licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.695."
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> * * *

b. ORCP 69 was amended effective 1-1-02 by OR LAWS 2001, c. 418, §1 as follows:

> **"B Entry of default judgment.**
>
> * * *
>
> "[*B(1)(d) The party against whom judgment is sought is not a minor or a person who is incapacitated or financially incapable, as defined by ORS 125.005, and such is shown by affidavit.*]
> "**B(1)(d) The party seeking judgment submits an affidavit showing that, to the best knowledge and belief of the party**

seeking judgment, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005 or a respondent as defined in ORS 125.005;

* * *

"[*B(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or a person who is incapacitated or financially incapable, as defined by ORS 125.005, unless the minor or person has a general guardian or is represented in the action by another representative as provided in Rule 27.*

"**B(2) By the court. In cases other than those cases described in subsection (1) of this section, the party seeking judgment must apply to the court for judgment by default. The party seeking judgment must submit the affidavit required by subsection (1)(d) of this section if, to the best knowledge and belief of the party seeking judgment, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005 or a respondent as defined in ORS 125.005. If the party seeking judgment cannot submit an affidavit under this subsection, a default judgment may be entered against the other party only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27.** * * *"

* * *

c. ORCP 70 A was amended by OR LAWS 2001, c. 417, §2, effective 1-1-02 as follows:

* * *

"A(2)(a)(viii) If the judgment awards costs and disbursements or attorney fees, that they are awarded [*and*], any specific amounts awarded**, a clear identification of the specific claims for which any attorney fees are awarde and the amount of attorney fees awarded for each claim**. This subparagraph does not require inclusion of specific amounts where such will be determined later under Rule 68 C.

* * *

d. ORCP 81 A was amended effective 1-1-02 by OR LAWS 2001, c. 445, §186 as follows:

* * *

"A(4) Consumer goods. 'Consumer goods' means consumer goods as defined in [*ORS 79.1090*] **section 2 of this 2001 Act**."

e. ORCP 84 D was amended effective 1-1-02 by OR LAWS 2001, c. 249, §79 as follows:

* * *

"D(2)(b) Other personal property. Tangible and intangible personal property in the possession, control or custody of or debts or other monetary obligations owing by a third person shall be attached by writs of garnishment issued by the clerk of a court or by an attorney as proviided in [*ORS 29.125 to 29.375 and 29.401 to 29.415*] **sections 1 to 65 of this 2001 Act.**

"**D(3) Notice to defendant. After taking property into custody under subsection 2(a) of this section, the sheriff shall promptly mail or deliver to the defendant, at the last-known address of the defendant, a copy of the writ of attachment, a copy of the claim of lien filed pursuant to section C of this rule, if any, a notice of exemptions form provided by section 64 of this 2001 Act, and a challenge to garnishment form provided by section 65 of this 2001 Act. The sheriff may meet the requirements of this subsection by mailing the documents to the last-known address of the defendant as provided by the plaintiff. The sheriff may withhold execution of the srit until the plaintiff provides such address or a statement that the plaintiff has no knowledge of the defendant's address. The sheriff shall have no duty under this subsection if the plaintiff provides a statement that the plaintiff has no knowledge of the defendant's address."**

* * *

5. Other items of possible interest:

a. HB 2932, which would have amended ORS 40.235 to provide that the physician-patient privilege would not apply to any communication relevant to a physical, mental, or emotional condition of a patient if the patient relies upon the condition as an element of his or her claim or defense, failed to obtain a do pass in committee and thus failed of enactment. Among other things this means that the anomaly created by ORCP 44 C persists.

b. OR LAWS 2001, c. 417, of which the amendment to ORCP 70 A shown at 4c above was a part, effective 1-1-02, made several important procedural changes respecting awards of attorney fees.

Summary of Testimony in Support of HB 3251

House Bill 3251, which would amend ORS 1.735(2), is proposed by the Council on Court Procedures and, in fact, was prepared by Council members. Its purpose is to enable the Council to take better advantage of the 30-day comment period between the October date on which proposed amendments to the Oregon Rules of Civil Procedure (ORCP) are published and the December meeting at which the Council takes final votes on whether actually to promulgate such amendments.

Since the Council came into existence in 1977 the statutes under which it operates, in particular ORS 1.735(2), have required that, at least 30 days prior to the December meeting at which it votes on whether to promulgate ORCP amendments, the full text of all amendments being considered for promulgation be published and that comments on them be invited from the bench, the bar, and the public. Nearly every biennium several comments are submitted, are carefully considered by the Council, and have often proved helpful or, rather, would prove helpful were it not for the "exact language" requirement of existing ORS 1.735(2).

Operating under the present "exact language" requirement of ORS 1.735(2) the Council may promulgate ORCP amendments only in the precise form that they were published. This means that the Council is effectively prohibited from making even the slightest improvements in the wording, or even punctuation, in other words the drafting, of any amendment as published, even if those improvements would not in any way alter its meaning or effect.

Naturally, the Council takes great pains to ensure that every amendment, before being published for comment, is drafted in the best possible fashion. However, there is no doubt but that it occasionally receives comments by which the drafting might be improved, a possible ambiguity removed, a more precise word or phrase substituted for a less precise one which might engender needless litigation. But the "exact language" requirement of the present ORS 1.735(2) prohibits the Council from adopting and gaining the benefit from any suggestions for improved drafting, even if it would involve only such small changes as a modification of punctuation or a division of one long, difficult-to-read sentence into two much clearer ones.

The "exact language" restriction was added to ORS 1.735(2) in 1993. Since then it has operated almost totally to deprive the Council of the benefit that can be gained from having the comment period. Although the Council has always been required to publish tentative amendments for comment, and properly so, during its first 13 years it was not subject to this hobbling restriction. On two or three occasions during those 13 years the drafting of an ORCP amendment was improved by adoption of one or more comments that were submitted by lawyers or judges. Although my own belief is that the Council does an excellent job, it certainly claims no monopoly of wisdom when it comes to drafting amendments to the practice rules of Oregon's trial courts.

The Council strongly supports this bill, and respectfully requests that it be enacted so that it can carry out its responsibilities in the best possible fashion, a fashion that would restore its freedom to take full advantage of the often valuable input it receives in the form of comments from the bench and bar. I believe that the statutory amendment that HB 3251 would accomplish includes ample safeguards against the Council's ever abusing that freedom even on the farfetched assumption that it might ever be inclined to do so. Those safeguards take the form of specific reporting requirements, to the Legislative Assembly, the bench, the bar, and the public, of any modification of an ORCP from the exact form in which it was published to the form in which it is promulgated.

Respectfully submitted,

Maury Holland, Executive Director
Oregon Council on Court Procedures

PROPOSAL NO. 2: PROPOSED AMENDMENTS TO RULES 44/55

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

RULE 44

A Order for examination.

(text unchanged)

B Report of examining physician or psychologist.

(text unchanged)

[*C Reports of examinations; claims for damages for injuries. 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.*]

C Health care records.

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

C(2) *Pretrial discovery of health care records from a party.* Any party against whom a civil action is filed for damages to another party for injuries or death may obtain copies of all health care records relating to the damages for which recovery is sought within the scope of discovery under section B of Rule 36 by either

C(2)(a) serving a request for production for such records on the damaged party or its legal custodian or

guardian pursuant to Rule 43; or

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

C(3) *Pretrial discovery of health care records directly from health care provider or facility.* Health care records within the scope of discovery under section B of Rule 36 may be obtained by a party against whom a civil action is filed for damages to another party for injuries or death only by the procedure described in paragraph (2)(b) above, or by the procedures described in section H of Rule 55.

D Report; effect of failure to comply.

(text unchanged)

[*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.*]

SUBPOENA
RULE 55

(**A** through **E** unchanged)

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

F(1) (unchanged)

F(2) (unchanged)

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 **other than health care records** 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.

G Disobedience of subpoena; refusal to be sworn or answer as a witness.

(unchanged)

[*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.

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.

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 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.

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.

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.

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.

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 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 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.

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

I(4) Application. The requirements of this section apply only to subpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550, a health care service contractor as defined in ORS 750.005, a home health agency licensed under ORS

chapter 443 or a hospice program licensed, certified or accredited under ORS chapter 443.]

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

H(1) *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 to another party for injuries or death 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:

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

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

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

or

H(3)(b) serve the SUBPOENA and AUTHORIZATION by mail on the health care provider or providers or facility or facilities indicated, along with the STATEMENT OF INSTRUCTIONS provided in subsection H(4) below; and

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

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

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

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

H(4)(b) In order to comply with this AUTHORIZATION and these INSTRUCTIONS, please make (------) copies of the designated records, place each copy in a separately sealed package bearing the address and postage to each of the names identified above, and place all of them together in one package or shipment, and mail that package within five (5) days of this date to the person whose records are sought or his or her representative, whose name and address are listed first above. Only ---------- (name of person or his or her attorney whose records are sought) is authorized to receive the copies of these records directly from you.

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

records.

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

H(5)(a) Except as provided in section I of this rule, when a subpoena is served upon a custodian of health care records in an action in which the health care provider is not a party, and the subpoena requires the production of all or part of the records of the health care provider relating to the care or treatment of a patient of the health care provider, it is sufficient compliance therewith if a custodian delivers by mail or otherwise the number of true and correct copies of all the records responsive to the subpoena indicated in the subpoena or statement of instructions, within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (6) of this section. The copies may be photographic or microphotographic reproduction.

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

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

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

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

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

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

The personal attendance of a custodian of health care records and the production of original records are required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(5) and

H(6) shall not be deemed sufficient compliance with this subpoena.

H(7)(b) If more than one subpoena duces tecum is served on a custodian of health care 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(8) *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.

H(9) *Obligation of party or attorney of party whose records are received from health care provider pursuant to subpoena.* Upon receipt of the sealed copies of the health care records addressed to each of the parties seeking access to them, the party whose records are sought, or his or her attorney, shall open only the copy addressed to that party or attorney, and shall have 14 days in which to review them. Not later than 14 days after receipt of the records from the health care provider or facility, the party whose records are sought shall either serve the unopened copy of the records on the party seeking them, or shall serve each such party with objections to their production pursuant to Rule 43 B.

H(9)(a) *Privilege or objection log.* When a party objects to the provision of health care records otherwise discoverable by subpoena pursuant to this section, the party shall make the objection expressly and shall

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

H(9)(b) Order compelling discovery. Upon receipt of an objection to all or part of a SUBPOENA and AUTHORIZATION or to any part of the health care records sent by a provider in response thereto, the party issuing the SUBPOENA and AUTHORIZATION may seek an order compelling discovery pursuant to Rule 46.

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

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

H(11) *Return or destruction of records.* Any health care records obtained pursuant to this section shall only be used for purposes of the pending litigation. After the litigation is resolved, the health care records shall be

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

I Subpoena of health care records for trial; attendance of custodian with original records at trial.

I(1) *Subpoena to trial.* Notwithstanding section H of this rule, a subpoena of health care records to trial may be served directly on the health care facility or its health care records custodian by the party seeking the health care records without an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS described in paragraph H(2)(b) of this rule or a STATEMENT OF INSTRUCTIONS described in subsection H(4) of this rule.

I(1)(a) Except as indicated in subsection (2) of this section, it is sufficient compliance with such a subpoena if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt thereof, sealed in an envelope addressed to the clerk of the court where the action is pending, accompanied by an affidavit described in subsection H(6) of this rule. The copy may be photographic or microphotographic. The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the health care provider or facility, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope shall be addressed to the clerk of the court or to the judge if there is no clerk.

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

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

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

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

Attachment C to Agenda of 10-13-01 Meeting

During the 1999-2001 biennium the following amendment to ORCP 34 B(2) was proposed by Mr. Brothers, but the Council deferred action on the proposal because of lack of time to consider it. [Matter to be added in bold underlined; matter to be deleted *italicized* and 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."

Attachment D to 10-13-01 Agenda

Sept. 25, 2002

To: Chair and Members, Council on Court Procedures

From: Maury Holland, Executive Director

Re: Recommendation re ORCP 4 K

I recommend that the Council consider possible appointment of a subcommittee to review and, if it appears necessary or helpful, amend ORCP 4 K. This recommendation is prompted by having been told by a number of lawyers conversant with family law or domestic relations practice in Oregon that Section 4 K does not accurately reflect, or entirely mesh with, domestic relations legislation adopted or amended since Section 4 K was drafted.

Examples of such subsequent legislation are the Uniform Interstate Family Support Act (ORS Chapter 110) and the Uniform Child Custody Jurisdiction and Enforcement Act (ORS 109.701 to 109.834). It seems that some categories of the jurisdiction which Oregon courts are authorized and required to exercise in this field are nowhere reflected in ORCP 4 K, the result being that recourse must be had to ORCP 5, where few lawyers would be likely to look for it. An underlying premise of this recommendation is that all categories of civil jurisdiction which Oregon courts are authorized to exercise should be reflected in ORCP 4 unless either ORCP 5 or 6 is pertinent.

At least in recent decades the Council has tended not to include many, if any, practitioners specializing in family or domestic relations law. I believe that is pretty much true of the present Council. I mention this because a colleague of mine at the U. of O., Prof. Leslie Harris, has told me that she would be willing to serve as a member of this subcommittee if a decision is made to appoint one. (I don't believe there is any legal or practical reason why *all* subcommittee members must be Council members.) Prof. Harris is co-author of a nationally known casebook on family law, and is very knowledgeable about the jurisdictional and other procedural aspects of this field.

Subject: CCP matter
Date: 07/09 3:40 PM
Received: 07/14 1:51 PM
From: Ben Bloom, bmb@roguelaw.com
To: mholland@law.uoregon.edu

Maury:

One of my partners brought an error in the ORCP to my attention. ORCP 62F refers provides in part: "except as provided in ORS 19.125 . . . " The legislature repealed ORS 19.125. The correct statutory cite is ORS 19.415.

Ben

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