Michael Brian
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October 26, 1999

By Fax to (503) 588-7179

J. Michael Alexander, Chair
Council on Court Procedures
Burt, Swanson, Lathen, Alexander
& McCann, P.C.
Attorneys at Law
388 State Street, Suite 1000
Salem, OR 97301

Re: ORCP 44A (amending to allow recording and presence of representative)

Dear Mick:

My practice consists of solely representing individuals who have suffered some type of physical injury as a result of the actions of an individual or corporation. In most claims, where a lawsuit is filed, the defendant requests a medical exam by a doctor chosen by the defendant or the defendant's attorney. Sometimes the other attorney and I can agree on the examining doctor and the ground rules regarding the examination. Often we cannot reach an agreement and ORCP 44A is used by the defense attorney to obtain an order of the court directing the injured individual to submit to a medical exam.

Please note that in the above paragraph I did not use the adjective "independent" in describing the medical exam. Even though that term is often used to describe the medical exam, in my opinion the term is inaccurate. Often the medical exam is adversarial. Even when it is not, disputes can arise about information provided during the exam, or the injured individual may feel uncomfortable being alone with a doctor who works for the other side in the lawsuit. Currently, ORCP 44A is silent as to any procedures to address these issues. Some courts have allowed the exam to be recorded and/or a representative to be present, but it is inefficient and expensive for the courts to establish procedures on a case-by-case basis.

For this reason, I believe that Oregon procedural law would be improved if ORCP 44A was amended to provide that at the medical exam the individual may be accompanied by a representative and may record the exam. This change can be accomplished by adding one or two additional sentences to ORCP 44A, similar to State of Washington Civil Rule 35(a). Under this procedural rule, an individual who is attending a defense medical exam has the right to record the medical exam and have a representative present. A copy of the rule is attached to this letter.

I am willing to appear personally before the Council on Court Procedures concerning the changes I am requesting in ORCP 44A.

Very truly yours,

Michael Brian

Michael Brian

MB/rlo
Enc.
MW\My Documents\Alexander Ltr. Oct. 26

WASHINGTON COURT RULES

STATE

1999

FOR FEDERAL RULES, SEE WASHINGTON COURT RULES, FEDERAL, 1999

FOR LOCAL RULES, SEE WASHINGTON COURT RULES, LOCAL, 1999

WEST GROUP

[redacted]e request shall set forth the items to be [redacted]ected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; September 1, 1997.]

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the 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. The party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination. Unless otherwise ordered by the court, the party or the party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner.

(b) **Report of Examining Physician or Psychologist.**

(1) If requested by the party against whom an order is made under rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. 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 that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

[Amended effective July 1, 1972; September 17, 1993.]

RULE 36. REQUESTS FOR ADMISSION

(a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. Requests

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William D. Robison
Robert C. Russell
Ben Shafton *
Don Thacker *
Diane M. Woolard

* Admitted in Oregon and Washington
** Admitted in Oregon

May 26, 1999

Mr. J. William Savage
Rieke & Savage, PC
140 SW Yamhill
Portland, OR 97204

Re: *Washington Defense Medical Examinations*

Dear Mr. Savage:

In response to you inquiry regarding the conduct of defense medical examination in the State of Washington I can provide a bit of empirical data. I have been practicing in the Vancouver/Clark County area for 15 years. The primary focus of my practice is plaintiff's personal injury work. Most of the defense medical examinations that my clients are asked to attend are conducted in Portland and its immediate surrounds.

It has been my practice to have a staff member attend defense medical examinations. The staff member present, taking notes and recording the proceedings on an audiotape. I have not had any experience in which this has resulted in any claim of interference with the conduct of the examination. I do feel that the presence of a representative of the injured party is important. This had not been my opinion originally. I have noticed, however, that the examinations conducted over the past two to three years tend to be much less adversarial and result in far fewer complaints of mistreatment by my clients. Frankly I cannot understand why a doctor would not consent to having a representative of the person being examined present and recording the proceeding.

I also note that the availability of a tape recording of the proceeding is very useful in cross-examining the doctor. Furthermore, if there is a transcription error in the report, both the doctor and attorney can go to the tape and quickly and easily clear the problem up. There are no more swearing contests between the injured party and the doctor.

I hope that these comments will be of assistance to you. Please do not hesitate to contact me if I can be of further assistance.

Very truly yours,

MORSE & BRATT

William D. Robison

WDR/tjs

DECLARATION OF BRADFORD J. FULTON
RE: DEFENSE MEDICAL EXAMINATION PRACTICE

I, BRADFORD J. FULTON, declare as follows:

1. I am over eighteen (18) years of age, fully competent and base this declaration upon my own personal knowledge.

2. I am a Seattle, Washington personal injury lawyer in good standing with the Washington State Bar Association since 1988. As a partner in the law firm of Fulton & Tuttle, my practice emphasizes the litigation of automobile accident claims, and necessarily involves the handling and resolution of personal injury protection medical examinations, as well as defense medical examinations pursuant to Civil Rule 35.

3. I have served on the Board of Governors for the Washington State Trial Lawyers Association since 1995, am a frequent CLE speaker on automobile accident claims, and am presently co-editing the two-volume WSTLA Automobile Accident Litigation Deskbook set for publication in late 1999/early 2000.

4. My professional experience is further detailed in the background profile attached as **Exhibit A** hereto.

5. During the course of my practice, I often participate in PIP medical examinations. In Washington, PIP Termination Exams (PTE's), while governed by Washington Administrative Code provisions (**Exhibit B**), are not specifically governed by Civil Rule 35(a), which authorizes: (1) the party being examined to have a representative present at the examination, and (2) the party's representative to make an audiotape of recording of the examination. Nevertheless, it is routine practice for lawyers in Washington State to record, via dictaphone, the

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interview and examination portions of the PIP examinations. Arrangements to record are made "up front" with the insurance carrier/attorney, and the examining physician(s) is(are) well aware that the examination will be recorded well in advance. **Exhibit C** contains a redacted letter of the type used by our office to effectuate notice of intent to attend and record such an examination.

6. **Exhibit D** to this declaration contains the first two pages of a recent PIP examination attended and recorded by me, without incident.

7. In my 11 years of practice, I have had few adverse experiences at PIP/defense exams caused by the unobtrusive recording of such examinations, especially when advance notice is given of the intent to record. In fact, many of the examining physicians in Washington themselves record the examination to insure an accurate and fair record. In my experience, the presence of the recording device provides the plaintiff/claimant assurance that they will be treated "fairly," it deters the examining physician from shaping or changing the facts provided to them, and the involved parties tend to conduct themselves more professionally, knowing that nay unprofessional conduct will be "on the record." Thus, not only does the recording of such examinations not interfere with the physician's ability to conduct his/her examination, it, if anything, increases the fairness of the process for all involved.

8. It has also been my experience that recording the examinations in no way interferes with the DME/PTE process. All that is required is that the attorney inserts a tape into their dictaphone, hit the "record" button and the examination proceeds.

9. Finally, attached as **Exhibit E** hereto is a copy of Washington Civil Rule 35(a), which expressly allow the examining party to have a representative attend the examination and record it. I would urge Oregon to adopt a similar rule for DME's/PTE's to insure the integrity

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and fairness of these examinations, especially when it is considered that the outcomes of these examinations often effect the substantive rights of the claimants.

10. Any handwritten changes made to this typed declaration were made by me in my own hand, and I have initialed each such change made.

11. I make this declaration under penalty of perjury of the laws of the State of Washington, and swear that the above and foregoing is true and correct to the best of my knowledge, recollection and belief.

DATED this 28th day of May, 1999.

Bradford J. Fulton, of
Fulton & Tuttle

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____

Plaintiff,	No.
v.	**AFFIDAVIT OF CRAIG SCHAUERMANN**
Defendant.	

State of Washington)
)
County of Clark)

I, Craig Schauermann, being first duly sworn on oath, depose and say that the following is true:

I am an attorney licensed to practice in the State of Washington and have my office in Vancouver. I have been in practice in Vancouver since 1979. In my practice I specialize in personal injury cases.

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GLAZER & ASSOCIATES, P.C., Attorneys at Law
4500 Kruse Way, Suite 390, Lake Oswego, Oregon 97035 (503) 635-8801

Over the past 20 years I have represented thousands of injured persons, many of whom have undergone "independent medical examinations". Most of these examinations, I would estimate about 70%, have been performed in Oregon by the same doctors who regularly administer "independent medical examinations" in Oregon cases. I am familiar with many Oregon IME doctors enough to know that as well as examining clients in Washington cases, they also examine persons in Oregon cases.

Under Washington law, a plaintiff being examined in an IME has the right to have a representative (attorney or other person) present and to make an audio tape recording of the IME. I am familiar with many, many IMEs at which, over the years, I have sent a representative along with my client and/or had the IME tape recorded. Many of these cases involved IMEs by Oregon doctors. I can think of no instance where an Oregon doctor complained that having a representative present with the examinee, or making an audio tape recording, was obtrusive or prevented the doctor from conducting an examination.

I believe that it is important to the protection of an injured person to have the right to have a representative present for an adversarial examination by an insurance-company-paid doctor, and the right make an audio tape recording. In fact, I have seen cases in which I believe a doctor is more honest in examining an injured person, and in stating conclusions afterward, because the IME has been witnessed and/or tape recorded.

GLAZER & ASSOCIATES, P.C., Attorneys at Law
4500 Kruse Way, Suite 390, Lake Oswego, Oregon 97035 (503) 635-8801

I make this Affidavit of my own personal knowledge.

DATED this 27 day of May, 1999.

Craig Schauermann

SUBSCRIBED AND SWORN to before me this 27th day of May, 1999.

Notary Public for Washington
My Commission expires: 3/15/03

JANICE M. BOYLAN
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
MARCH 15, 2003

GLAZER & ASSOCIATES, P.C., Attorneys at Law
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d appellants' property. As evidenced e description set forth in note 2, we find that the court established a fixed boundary at the 1,100-foot contour line and not an ephemeral boundary to be evidenced by the varying high-water level of Lake Chelan. In addition, the court provided that respondents' property, during those periods in which it was not submerged, was subject to an appurtenant easement by which the appellants could gain access to the water.

We find no merit to the contention of appellants that the boundary consisted of the ephemeral shoreline of Lake Chelan. If that were so, the boundary would be the shoreline wherever the water's edge should lie and it would have been inconsistent and unnecessary for the court to grant an easement over and across the defendants' property at those times when that property was not submerged. We find the 1964 judgment is unambiguous and does not warrant modification.

[2] Appellants next contend that the newly deposited soil was the result of an accretion and not an avulsion. We disagree. The testimony clearly indicates the entire area developed within a period of 3 to 20 days, the result of a highly visible and turbulent flooding of Twenty-five Mile

This sudden and rapid change is termed in law an avulsion, and differs from accretion in that the one is violent and visible, while the other is gradual, and perceptible only after a lapse of time.

See also Hirt v. Entus, 37 Wash.2d 418, 224 P.2d 620 (1950). The testimony here clearly reveals the development of an avulsion and not an accretion.

[3] Lastly, appellants contend that regardless of a finding fixing the boundary at the former 1,100-foot contour level, the equities dictate the appellants be placed in the status of riparian owners. They contend that Hudson House, Inc. v. Rozman, 82 Wash.2d 178, 182, 509 P.2d 992, 994 (1973), requires "an upland owner should not be cut off from 'access to water which is often the most valuable feature of their property'."

We are unable to conclude that the equities noted in Hudson House, Inc. v. Rozman, *supra*, are applicable. In that case there developed a large accretion of land in front of what had previously been waterfront property abutting the Pacific Ocean. The court held that the riparian property owners[3] must be afforded access to the water, even though such access would be gained by crossing over an exten-

E.W.M., Chelan County, Washington and said Boundary is more particularly described as follows:
"Commencing at a Brass Cap Monument, on the West Line of said Sec. 19 and the South Side of Lake Chelan, established as the Witness Corner for the original Meander Corner on said West Line of Sec. 19; thence S 69° 35'00" E for 1071.9 feet; thence S 47° 00'30" E for 246.0 feet to a ¾" Iron Rod and the TRUE POINT OF BEGINNING for this description; thence N 70° 35'00" E for 45.5 feet to a 2" Iron Pipe Fence Post; thence N 5° 18'00" E, along a fence, for 47.0 feet to a ¾" Iron Pipe; thence N 40° 29'30" E for 14.0 feet to a ¾" Iron Pipe; thence N 12° 04'30" E for 80.3 feet to a ¾" Iron Rod boundary marker; thence continuing N 12° 04'30" E for 6 feet, *more or less to the 1100-contour, on the South Shore of Lake Chelan as of October 24, 1963*; thence Easterly along said 1100-ft. contour on the South Shore of Lake Chelan to Twenty-five Mile Creek." (Italics ours.)

3. In Botton v. State, 69 Wash.2d 751, 753, 420 P.2d 352 (1966), the court stated that the term riparian as used today incorporates the term littoral, *i. e.*, one whose land abuts upon a lake, is acceptably described as a riparian owner as is one whose land abuts upon a river. We have used the term "riparian" as applicable also to one whose land abuts upon an ocean.

does not lie with these plaintiffs in that the 1964 judgment modified the legal description of that ownership from the language contained in the deed: "thence down the center line of 25 Mile Creek to the South shore of Lake Chelan; thence in a northwesterly direction along the shore of Lake Chelan" to a description "for 6 feet, more or less to the 1100-ft. contour, on the South Shore of Lake Chelan as of October 24, 1963; thence Easterly along said 1100-ft. contour on the South Shore of Lake Chelan to Twenty-five Mile Creek, . . ." By that judgment, it is the 1,100-foot contour line that controls, not the shoreline of the lake. To extend that boundary to what is now the 1,100-foot contour level would be inequitable. The area in dispute is the formerly submerged property of the respondents, onto which the flood deposited an exceedingly large amount of soil and other materials. To now award this addition, or any part thereof, to the appellants, would be to totally deprive the respondents of the right to their property. While appellants' property no longer periodically abuts the waters of Lake Chelan, appellants still maintain an easement over and across the property of the respondents in order to gain access to the waters of the lake. Though the use of this easement has become permanent rather than seasonal, we cannot conclude that such constitutes an inequitable result under these circumstances.

[4] Lastly, appellants assign error to the awarding of damages. This assignment of error is not argued in the brief. We do not consider such assignments. Hardcastle v. Greenwood Savings & Loan Ass'n, 9 Wash.App. 884, 516 P.2d 228 (1973).

Judgment affirmed.

McINTURFF, C. J., and GREEN, J., concur.

DEPARTMENT OF [illegible]
TRIES of the [illegible]
lington, [illegible]adent.
No. 1179-11.

Court of Appeals of Washington,
Division 2.
March 28, 1975.

A workmen's compensation claim was dismissed on a motion based on insufficiency of evidence to support a jury verdict. Testimony relating to psychiatric disability had been stricken by the Clallam County Court, G. B. Chamberlin, J., following claimant's failure to comply with an order of the Board of Industrial Insurance Appeals for a psychiatric examination, sought by the Department of Labor and Industries. The claimant appealed. The Court of Appeals, Armstrong, C. J., held that the striking of the testimony was not a proper sanction and that the Department was not entitled to a psychiatric examination of the claimant without showing good cause for such examination.

Reversed and remanded.

1. Workmen's Compensation ⇐1305

Rule providing for order for physical or mental examination applies in workmen's compensation cases as well as in other civil proceedings. CR 35, 35(a); RCWA 51.52.140.

2. Damages ⇐206(7)

Generally, during physical examination of plaintiff requested by defendant, plaintiff is entitled to have his attorney present, and a like rule applies to mental examinations, but a plaintiff is not entitled to have his wife present at a psychiatric examination. CR 35, 35(a); RCWA 51.52.140.

3. Damages ⇐206(4)

It is not an abuse of discretion for trial judge to refuse to order physical ex-

tion of plaintiff after trial has begun, and like rule applies to psychiatric examination. CR 35, 35(a); RCWA 51.52.140.

4. Damages ⇐206(4)

Propriety of ordering physical or psychiatric examination just before or during trial depends on effect of resultant delay in proceedings and whether defendant has shown good cause for requesting examination at such time. CR 35, 35(a); RCWA 51.52.140.

5. Workmen's Compensation ⇐1308

In view of clear lack of diligence on part of Department of Labor and Industries in seeking examination of claimant, it was an abuse of discretion to order a psychiatric examination of the claimant after the claimant had rested his case. CR 35, 35(a).

6. Discovery ⇐70, 77, 107, 129

Rule providing for sanctions for failure to make discovery was designed to allow trial courts to use as many and varied sanctions as justice requires, and to balance rights of parties so that refusing party does not benefit. CR 37, 37(b).

7. Workmen's Compensation ⇐1314

Using most drastic sanction available, i. e., striking of psychiatric testimony, for failure of workmen's compensation claimant to appear for psychiatric examination as ordered was clear violation of cardinal principle that remedial and beneficial purposes of Workmen's Compensation Act should be liberally construed in favor of the injured workman. CR 35, 35(a), 37, 37(b).

8. Workmen's Compensation ⇐1309

Department of Labor and Industries was not entitled to psychiatric examination of workmen's compensation claimant without showing good cause for such examination. CR 35, 35(a).

Eugene Arron of Walthew, Warner, Keefe, Arron, Costello & Thompson, Seattle, for appellant.

Slade Gorton, Atty. Gen., Edwin J. M[illegible] Cullough, Jr., and David W. Robinson, A[illegible] Attys. Gen., Seattle, for respondent.

ARMSTRONG, Chief Judge.

Wilmer M. Tietjen appeals from a judgment granting the motion of the Department of Labor and Industries to dismiss his claim on the basis of insufficiency of the evidence to support a jury verdict. Claimant Tietjen's testimony relating to psychiatric disability was stricken following his failure to comply with an order of the Board of Industrial Insurance Appeals requiring a CR 35 psychiatric examination, at the department's request.

Tietjen contends that refusal to be examined without his wife's presence was not a violation of the order, that it was error to order such an examination two and one-half months after he rested his case, and that the striking of the testimony was an improper sanction under CR 37 for claimant's alleged failure to comply with discovery rule CR 35.

We hold that the judgment must be reversed because the department did not demonstrate diligence in seeking additional psychiatric testimony and the striking of claimant's testimony was an improper sanction in this case.

Tietjen suffered an industrial injury to his back on November 19, 1962. After administrative procedures he received time loss payments for temporary total disability between 1963 and 1967. His claim was finally closed on May 11, 1970 with an award of 25 percent of the maximum amount allowable for unspecified permanent disability.

In his notice of appeal to the board on the final closing order, Tietjen alleged that the injury had affected both his physical and mental condition.

A conference with the hearing examiner was held on August 27, 1970. At this conference hearing dates for the claimant's but not the department's testimony were scheduled. Also at this conference, the department moved for a CR 35 mental examination, but after a discussion off the record the department requested that the motion be kept in suspense. At that time the department was obviously aware of some problems in obtaining the testimony of Dr. Fisk, their psychiatric witness who had examined claimant at a time close to the final closing of his claim.

At the original hearing before the examiner on October 23, 1970, Tietjen testified. At a continued hearing on November 4, 1970, he presented the testimony of a general practitioner, Dr. Brown, and Dr. Jarvis, a psychiatrist, and rested his case. At the conclusion of the November 4 hearing, the matter was continued to a date to be set by agreement of the parties for presentation of the department's medical testimony of Drs. Gray and Fisk. Prior to such scheduling, on January 20, 1971, the department moved for a CR 35 examination by Dr. Freidinger, a psychiatrist, stating that Dr. Fisk was unavailable to testify. The claimant objected, contending that the department did not show good cause for an examination at a point after he had rested his case. The motion was granted. Claimant objected further, basing his objections on, in addition to the above, "the past experience" he had had with Dr. Freidinger. An amended motion was made, followed by a February 19, 1971 order requiring Tietjen to undergo a psychiatric examination by Dr. Freidinger on March 5, 1971. He appeared for the examination, but refused to be examined unless his wife was allowed to be present. As the board order stated, "Apparently Dr. Freidinger took the position that from a professional point of view, it was impossible for him to conduct a satisfactory examination in the presence of a third party."

On March 9, 1971, the [illegible] to dismiss the appe[illegible]i[illegible] alternative to strike testimony [illegible]ating to psychiatric disability presented by the claimant. At a hearing held on April 15, 1971, oral argument was had on the motion and Tietjen's affidavit, stating the reasons for his refusal to be examined by Dr. Freidinger without his wife present, was received. On April 16, 1971, the examiner ordered that all claimant's testimony relating to psychiatric disability be stricken. On May 16 and June 29, 1971, both parties presented lay testimony. Claimant petitioned for board review. On May 25, 1972, the board upheld the decision of the hearing examiner. Tietjen appealed to the Superior Court for Clallam County and upon the department's motion, judgment was entered affirming the board's holding and dismissing the appeal for failure to state a prima facie case for recovery.

[1] Civil Rule 35(a) [1] applies in workmen's compensation cases,[2] as well as other civil proceedings, and therefore the board had the authority to enforce a valid order for psychiatric examination. Claimant contends that he did not refuse to obey the CR 35 examination order by conditioning it upon his wife's presence.

[2] Even though claimant desired the presence of a witness, he was not entitled to have his wife present during the psychiatric examination requested by the department. The presence of a family member would inhibit the atmosphere of free expression necessary to a psychiatric examination and would not serve the important function that an attorney would. A plaintiff or claimant is, however, entitled to have his attorney present at such an examination.

1. CR 35(a) provides: "When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his 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."

2. RCW 51.52.140 provides in part: "Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter."

question, the general rule is that dur- a physical examination of the plaintiff requested by the defendant, the plaintiff is entitled to have his attorney present. Sharff v. Superior Court, 44 Cal.2d 508, 282 P.2d 896 (1955); Steele v. True Temper Corp., 16 Ohio Op.2d 196, 174 N.E.2d 298 (1961); 64 A.L.R.3d 497 (1959). In *Sharff*, the court stated, 44 Cal.2d at 510, 282 P.2d at 897:

> The doctor should, of course, be free to ask such questions as may be necessary to enable him to formulate an intelligent opinion regarding the nature and extent of the plaintiff's injuries, but he should not be allowed to make inquiries into matters not reasonably related to the legitimate scope of the examination. [Citations omitted.] Whenever a doctor selected by the defendant conducts a physical examination of the plaintiff, there is a possibility that improper questions may be asked, and a lay person should not be expected to evaluate the propriety of every question at his peril.

We see no reason why a different rule should be applied where a psychiatric examination is ordered. A CR 35 medical and mental examiantion is a legal proceeding, at which the plaintiff is entitled to representation. A physician-patient relationship establishing privilege does not exist where the plaintiff in a personal injury action is examined by a physician at the request of the defendant. Strafford v. Northern Pac. R.R., 95 Wash. 450, 164 P. 71 (1917). There may be questions which the plaintiff may refuse to answer, especially those possibly prohibited by the Fifth Amendment protection against self-incrimination.[3] An attorney insures that the procedure, tests and results are report- does not become the taking of deposition as to the facts in issue. Any unnecc interference caused by an attorney could be alleviated by specific court order. State ex rel. Staton v. Common Pleas Court, 4 Ohio App.2d 10, 211 N.E.2d 63 (1964), rev'd on other grds, 5 Ohio St.2d 17, 213 N.E.2d 161 (1965) (plaintiff entitled to his attorney's presence at psychiatric examination requested by defendant); Nomina v. Eggeman, 26 Ohio Op.2d 122, 188 N.E.2d 440 (1962) (same); *See* 1 M. Belli, Modern Trials § 85 at 567 (1954).

[3,4] Tietjen also contends that it was error to order a CR 35 examination after he rested his case. Generally, in Washington as well as in a majority of other jurisdictions, it is not an abuse of discretion for the trial judge to refuse to order a physical examination of the plaintiff after trial has begun. Finn v. Bremerton, 118 Wash. 381, 203 P. 971 (1922); Myrberg v. Baltimore & Seattle Mining & Reduction Co., 25 Wash. 364, 65 P. 539 (1901); 9 A.L.R. 2d 1146, 1150 (1966). There is no reason for a different rule for a psychiatric examination. The question before us is whether it was an abuse of discretion *to order* an examination after the claimant rested his case. The propriety of ordering a CR 35 examination just before or during trial depends upon the effect of a resultant delay in the proceedings and whether the defendant has shown good cause for requesting the examination at that time.

[5] While in workmen's compensation cases, testimony is often presented over a several month period, an unusually long delay occurred before the department determined that an additional psychiatrist's examination was required. Most importantly, the department showed no good

3. The need of protection against self-incrimination was made apparent in the notice of Rule 35 served upon claimant's attorneys. The specific provision stated: "Dr. Arthur W. Freidinger has agreed to examine Mr. Tietjen on Wednesday, February 10, 1971, at his office at 1823 Spring Street, Seattle, Washington. The purpose of this examination is for a psychiatric evaluation, and *will inquire into all aspects of Mr. Tietjen's life.* Mr. Tietjen is to make his presence known shortly before or at 11 A.M." (Italics ours.)

cause for the delay. is apparent. The May 28, 1970 notice of appeal put the department on notice that claimant's psychiatric condition was put into issue. Two months before Tietjen began his case and five months before it requested the CR 35 examination, the department was cognizant of potential problems in obtaining the testimony of Dr. Fisk. At the August 27, 1970 conference, after making the request for the examination, the attorney for the department stated, "I would like to keep this request in suspense for the next week and we will check on whether we are going to need it." In an affidavit attached to the motion for the CR 35 examination, the attorney for the department stated that when he attempted to schedule Dr. Fisk's testimony, he discovered that the doctor had moved to South Dakota. Attempts to contact him were unsuccessful for three weeks, and when finally reached, Dr. Fisk replied that he did not have his record of the examination of the claimant and that he thy that this affidavit up dates for these contacts. If it, they were made soon after the notice of appeal, the examination was requested only after substantial delay. If, on the other hand, they were made just subsequent to the filing of the motion, a substantial delay was had before the department made any effort to contact its witness. Moreover, no effort was made to obtain the deposition of Dr. Fisk or to subpoena him. That Dr. Fisk would not agree to testify is substantially different than saying that he would not testify if ordered to do so. In light of these circumstances there was a clear lack of diligence and it was an abuse of discretion to order the CR 35 examination after the claimant had rested his case.

[6,7] We turn finally to the question whether striking Tietjen's psychiatric testimony was a proper sanction. CR 37(b)[4] provides for a variety of sanctions for failure to make discovery, including failure to participate in a CR 35 examination. CR

4. CR 37(b) provides:

"(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

"(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

"(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

"(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

"(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

"(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

"In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

EVERETT B. COULTER, JR. *
JOSEPH P. GAGLIARDI
MICHAEL C. GERAGHTY
M. JANE PARRY *
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* ALSO ADMITTED IN IDAHO

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December 20, 1999

The Honorable Janice Wilson
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, OR 97204-1123

RE: Washington IME's

Dear Judge Wilson:

One Oregon Association of Defense Counsel circulated an e-mail regarding conduct of independent medical examinations in Washington.

I have been practicing for 25 years and most of my practice is defense work. I practice in Eastern Washington and North Idaho and probably have 20-30 IME's per year conducted.

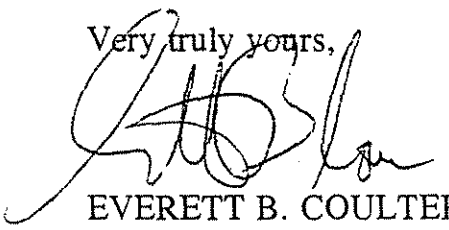
In my experience, having a witness attend the IME, audio recording the IME or even video recording the IME is generally not justified. I have not kept any statistics on my practice, but I would estimate that less than 25% of the IME's that I request involve a witness, audio recording or video recording. It is generally an inexperienced lawyer who somehow has the perception that the IME is biased, slanted and inappropriate. Recently I had an experience with an attorney insisting that the IME be video taped, and I did review the video tape of the IME. The result of the video taping was that the examination took significantly longer than usual. I think a potential problem exists in audio taping or video taping the IME and then subsequently allowing the tape to be played to the trier of fact in that it becomes duplicative in terms of testimony.

I have had some concerns of audio and visual taping IME's in that many physicians are not willing to have the matter audio taped or video taped. In a particular case, audio means recorded the IME and the plaintiff kept crying out when the physician was applying feather touch to the effected area and the impression that one may have reached was that the doctor was hurting the patient.

In terms of video taping IME's, I think a very definite risk exists and that it is an intrusive process when an individual is garbed in a hospital gown and truly does not present all that well.

I am not certain what experience the Oregon courts have had with how the IME's are conducted, but in my opinion and experience, if a plaintiff does want to have someone along then a third party independent witness that observes the process is probably the best safe guard - assuming a safe guard is necessary. Recording, whether audio or video, is an effort to create a chilling atmosphere around doctors that would be willing to perform IME's. I have a very strong sense that some plaintiff's attorneys have sought to freeze out physicians from performing IME's.

Very truly yours,



EVERETT B. COULTER, JR.

EBC:jh

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Direct Dial: 503-499-4420

December 21, 1999

Hon. Janice R. Wilson
Circuit Court Judge
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, OR 97204

Re: Potential Change in Motion Panel Position on Independent Medical Exam

Dear Judge Wilson:

I understand from Judge Jones that the Motions Panel is considering a change to its position that a party subjected to an IME is not allowed to tape the IME or have a third party present. I have surveyed a number of Oregon Association of Defense Counsel members, including several who practice in Washington. I have also talked with a number of defense attorneys who practice in the state of Washington, which allows for taping and the presence of a third party.

The Oregon Association of Defense Counsel believes strongly that a change in the rule would interfere with the independent medical exam process, raise the cost of litigation and involve the court more frequently in discovery battles. First, we believe it will have a chilling effect on physicians willing to do independent medical exams. As you know aggressive litigation strategies have already caused some medical practitioners in Oregon to severely limit the number of independent medical exams they perform or stop performing this service altogether. We believe that allowing tape recording of such exams and in particular allowing a third party to attend would exacerbate this problem significantly.

Second, this will clearly increase the cost of litigation, as the party having the IME will either bring their counsel or another medical practitioner to the IME. This will add costs to every case.

Most importantly, we foresee any change in the rule as creating the opportunity for a myriad of discovery battles surrounding the extent and nature of third party participation in IMEs. This would unnecessarily take up the court's time to resolve these battles.

As to the Washington experience, the practice has evolved of involving the court in actual selection of the medical examiner. Representatives frequently interfere with the process

even though the rule prohibits such interference. They will object to certain questions, answer questions instead of allowing the examinee to answer, provide information focused on the legal process rather than the medical issues, and become argumentative with the medical practitioner. These issues are particularly important with psychiatric medical exams. The conditions must be ideal for such exams and the presence of a third party is a significant interference in this type of exam.

Other Washington lawyers report that there has not been any particular utility to result from the presence of a representative other than to attempt to interfere with the process during the IME.

In Washington there are a number of disputes, resetting of IMEs and delays involving what constitutes a proper representative. Parties have attempted to bring a variety of experts into the IME, including nurse practitioners, chiropractors, their treating physician, paralegals or their counsel. Recently one of my partners in our Washington office had Judge Ladley rule that it was improper to bring an expert to an IME.

If you would like some more specific examples of how the rule has been implemented in Washington and some of the problems that have been created, we would be happy to provide you with those details. We thank you very much for soliciting our input on this important matter. We would request that the Motion Panel consider having an open forum or roundtable discussion with a group of plaintiffs' and defense lawyers on this issue before a decision is made, if a change is under consideration. Thank you very much for your review of these matters.

Sincerely,

Chrys A. Martin

CAM:ejl
cc: OADC Board

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http://www.OrMedAssoc.org
oma@ormedassoc.org

OREGON MEDICAL ASSOCIATION

December 17, 1999

The Honorable Robert P. Jones
1021 SW 4th
Portland, OR 97204

Dear Judge Jones,

Per our recent phone conversation here is the letter from OMA's outside counsel on the subject of IME recordation.

Happy holidays!

Sincerely,

Paul R. Frisch

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*Also Member of District of Columbia Bar
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RAYMOND F. MENSING, JR.
(1930-1999)

December 14, 1999

Mr. Paul Frisch
Oregon Medical Association
5210 SW Corbett Ave.
Portland, OR 97201

Re: Recording and Attorney's Presence at IME's

Dear Paul:

I enclose herewith a copy of the case of *Pemberton v. Bennett* in which the Oregon Supreme Court ruled that whether plaintiff was entitled to have her attorney present at an IME was left to the sound discretion of the trial court. The state of the existing law in Oregon is that if the plaintiff can convince the trial court that there is a legitimate need for a lawyer to be present, that can be accomplished with the proper showing to the trial court. If the plaintiff's lawyer is going to be allowed to be present, shouldn't the defendant's lawyer also be allowed to be present? If this is a female patient being examined, is this going to result in a lot of embarrassment to all parties concerned, and is it going to interfere with an effective evaluation by the physician?

I am less concerned about tape recording the IME as I am about the lawyer being present. I assume it would be the plaintiff's responsibility to do the recording.

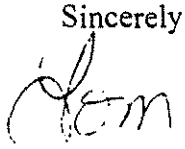
I think some physicians will be unwilling to conduct IME's if lawyers are present. The existing rule has worked reasonably well throughout the years and I think it should be left as it is, with it remaining in the sound discretion of the trial court whether an attorney may be present or if it is to be recorded. I attach the State of Washington rule. Mick Hoffman, who does most of his practice in Washington, says it works okay.

The other issue that was raised was the matter of plaintiffs' lawyers subpoenaing physicians as fact witnesses and not following the guidelines of the OMA and the Oregon State Bar for payment of time loss. Unfortunately, these are only guidelines and always have been, and there is no way to enforce them. However, the plaintiff's lawyer takes the risk that he will get an

angry, hostile witness who may not be cooperate. Part of the problem, from the plaintiff's lawyer's standpoint is that the costs or the fees being charged by physicians nowadays are sometimes quite high and the case just doesn't justify spending that type of money.

If you wish to pass this on to Judge Jones, feel free to do so.

Sincerely,



Thomas E. Cooney

TEC/alw
Enclosures

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Argued April 4, affirmed May 15, 1963

PEMBERTON v. BENNETT ET AL

381 P. 2d 705

Personal injury action. From a judgment of the Circuit Court, Multnomah County, Virgil Langtry, J., the plaintiff appealed. The Supreme Court, Denecke, J., held that order calling for examination of the plaintiff out of the presence of the plaintiff's attorney by a doctor selected by the defendants was not an abuse of discretion.

Affirmed.

Damages—Medical examination—Presence of counsel

1. Determination in personal injury action of whether counsel may insist upon being present at a medical examination of his client by a physician other than the treating physician lies within discretion of trial court.

Damages—Medical examination out of presence of attorney

2. Order in personal injury action calling for examination of plaintiff out of the presence of the plaintiff's attorney by a doctor selected by the defendants was not an abuse of discretion.

Damages—Proof—Injuries—Result of prior accident

3. Proof in personal injury action that plaintiff's injuries were not caused by defendants' fault and were the result of a prior accident was properly adduced, under pleading denying that defendants' conduct had caused plaintiff's injuries, to establish that injuries were the result of a prior injury, and admission of such proof was not objectionable on theory that its admission, in absence of a mitigation pleading, represented an unpermitted effort to establish mitigation of damages.

Damages—Instruction—Aggravation of a prior injury

4. Trial court properly instructed jury in personal injury action concerning the law against recovery for an aggravation of a prior injury even though aggravation of a pre-existing injury had not been pleaded in view of fact that defendants had urged that the injuries for which damages were sought were caused by a prior accident and in view of medical testimony indicating a relationship between present physical condition and prior accident.

See right of party to have his attorney or physician present during his physical examination at instance of opposing party.
17 Am Jur, Discovery and Inspection (rev ed § 45).
64 ALR2d 497.
CJS, Damages § 174.

Department 2.

Appeal from Circuit Court, Multnomah County.

VIRGIL LANGTRY, Judge.

Martin Schedler, Portland, argued the cause for appellant. On the briefs were Schedler & Moore, Portland.

Thomas E. Cooney, Portland, argued the cause for respondents. With him on the brief were Maguire, Shields, Morrison, Bailey & Kester, Portland.

Before MCALLISTER, Chief Justice, and PERRY, O'CONNELL, DENECKE and LUSK, Justices.

AFFIRMED.

DENECKE, J.

The defendants admitted liability and plaintiff recovered a verdict in a personal injury action in the sum of $1,731.55. Plaintiff alleges that she suffered serious injuries and in her complaint she prayed for $45,000 general damages and $1,231.55 special damages. Plaintiff has appealed from the verdict.

Plaintiff assigns as error the trial court's granting of defendants' motion to require plaintiff to be physically examined by a physician selected by the defendants out of the presence of plaintiff's attorney. Defendants' motion was accompanied by an affidavit. It recited that it had been arranged for plaintiff to be examined by a physician; that the plaintiff arrived with her attorney who refused to permit the plaintiff to be examined unless he was present; and that the physician refused to make the examination under these conditions. There is nothing to indicate in what way plaintiff believed her physical examination out of the presence of her attorney would be or was prejudicial

to her. The defendants did not offer any testimony at the trial and the physician who examined the plaintiff did not testify.

Other jurisdictions have varied in their solution to this problem; partially depending upon statutes of the jurisdiction and the particular circumstances attendant upon the examination. See Annotation, "Right of party to have his attorney or physician present during his physical examination at instance of opposing party," 64 ALR2d 497 (1959).

This court in *Carnine v. Tibbetts,* 158 Or 21, 74 P2d 974, hold that the requirement of a physical examination by a physician selected by the opposing party is largely within the discretion of the trial court. In that case, however, it was held that the trial court abused its discretion by refusing to order a physical examination. The court there stated, at p 34:

> "The order requiring the litigant to submit to a physical examination should contain provision for reasonable safeguard against offending or injuring the party to be examined. If the plaintiff has any objection to being examined by the doctor suggested by the defendant, the court should designate some physician of competent skill, indifferent between the parties: * * *
>
> "Other matters which may arise relating to the examination should be provided for in the order appointing the physician. * * *"

The right of counsel to be present was not discussed.

1. We hold that whether or not counsel can insist on being present at a medical examination of his client by a physician other than the treating physician, is a matter largely within the discretion of the trial court.

The most compelling ground for conditioning the right to a physical examination upon the right of coun-

sel to be present is that when a person retains counsel to represent him in litigation, such counsel ordinarily can be present at all times to advise his client in any matter affecting the lawsuit. On the other hand, a medical examination is not an occasion when the assistance of counsel is normally necessary. This is so because of the nature of a medical examination, which is very different, for example, from an oral discovery examination by opposing counsel. It is also not ordinarily regarded as an adversary proceeding because a medical examiner is not supposed to be, and ordinarily is not, seeking to establish facts favorable to the party who engaged him to make the examination. This is the case even though the examining physician is selected and compensated by the opposing party.© Unfortunately, such objectivity is not always present.

The presence of an attorney in an examination would probably tend to prolong the examination and could create an atmosphere in which it would be difficult to determine the examinee's true reactions. This would result in it becoming more difficult to secure a medical examination by the kind of physician whose opinions are particularly desired by the court, i.e., those who regard the examination as an objective attempt to find the facts, regardless of the consequences to any party.

However, there are certain occasions when the trial court might determine that the attorney's presence at all or part of an examination is a reasonable request. The examinee, the examiner, the nature of the proposed examination or the nature of the medical problem,—these factors, separately or collectively, could cause the trial court to condition the examination upon the attorney being permitted to be present at all or part of the examination.

© Principles of Medical Ethics, American Medical Association, § 6: "A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care."

2. In the instant case, no reason was advanced why it was desirable or necessary that the attorney for the plaintiff be present at the examination. The trial court had no basis for determining whether or not the examination should be conducted with or without the presence of plaintiff's counsel. This assignment of error is found to be groundless.

3. The defendants attempted to prove at trial that the plaintiff's injuries were not caused by defendants' fault but had been caused by a prior accident. Plaintiff objected to such proof and now contends that its admission was error because such proof was a matter of mitigation of damages and mitigation had not been pleaded by the defendants. This is not a matter of mitigation of damages. Defendants were contending that the plaintiff's condition was not caused by the conduct of the defendants, but rather was caused by a prior accident. This is a contention that may be made under pleadings in which the defendants deny plaintiff's injuries were caused by defendants' conduct.

4. Plaintiff excepted to the court's instruction to the jury that the plaintiff could not recover for an aggravation of a pre-existing injury because the plaintiff had not pleaded aggravation. Plaintiff argues that aggravation was not in the case because she did not plead it and neither did defendants. As above stated, the defendants did urge that the injuries plaintiff was seeking damages for were caused by a prior accident. The physician called by the plaintiff testified that there was some relationship between plaintiff's pres-

ent physical condition and the prior accident. The trial court was justified in believing, under these circumstances, that an instruction that the plaintiff could not recover for an aggravation of a prior injury was necessary for the clarification of the jury.

Judgment affirmed.

Argued April 4, Affirmed May 15, 1963

MARTIN v. GOOD

381 P. 2d 713

Suit for rescission of exchange of motels. From an adverse judgment of the Circuit Court, Marion County, George A. Jones, J., the plaintiff appealed. The Supreme Court, Denecke, J., held that evidence was insufficient to establish that plaintiff, who was an experienced businessman and who had worked as an accountant for almost 10 years, was entitled to rescission on ground of inadequacy of consideration and misrepresentation of income from motel he received in the exchange.

Decree affirmed.

Exchange of property—Evidence insufficient

1. Evidence was insufficient to establish that plaintiff, who was an experienced businessman and who had worked as an accountant for almost 10 years, was entitled to rescission of exchange of motels with defendant on ground of inadequacy of consideration and misrepresentation of income from motel he received in the exchange.

Appeal and error—Equity—Opinion of trial judge

2. In equity cases, the facts are tried de novo by reviewing court, but in case involving contradictory testimony, opinion of trial judge who saw witnesses and had an opportunity to appraise the value of their testimony, is entitled to great weight.

Appeal and error—Decree in equity

3. Reviewing court will not reverse a decree in equity case by deciding one witness is to be believed and another witness is not to be believed unless because of peculiar circumstances reviewing court is convinced that trial court's decision in that regard is clearly erroneous.

Exchange of property—Evidence insufficient

4. Evidence was insufficient to establish that plaintiff, who claimed that he would not have exchanged motels with defendant if he had known that a person acting as agent for defendant had an interest in defendant's motel, was not informed by defendant of such agent's interest.

Principal and agent—Double agency

5. When there is a double agency, one principal cannot charge the other principal by reason of the agent's breach of his agency obligation unless such breach was at the instigation of the other principal.

ty. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; September 1, 1997.]

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the 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. The party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination. Unless otherwise ordered by the court, the party or the party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. 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 that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

[Amended effective July 1, 1972; September 17, 1993.]

RULE 36. REQUESTS FOR ADMISSION

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. Requests

MARCUS

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Retired
CARRELL F. BRADLEY

*Also licensed in Washington

January 5, 2000

Hon. Janice Wilson
Circuit Court Judge
Multnomah County Courthouse
1021 SW Fourth Avenue
Portland, OR 97204

Re: Proposed Rule Changes Regarding Medical Examinations

Dear Judge Wilson:

I have learned that you are the new chair of the Multnomah County Motion Panel that is now considering a rule change relating to defense medical examinations. Specifically, being considered, based only on what I have been told, is a rule that would permit the plaintiff and the plaintiff's attorney to somehow record (audio and/or video) the examination or have an observer present during the course of that examination.

Before any court rule is changed or new rule adopted, I urge your panel to take the steps necessary to determine if a problem that requires correction truly exists. Have there been abuses and, if so, who was involved (both sides) and what happened? There may have been abuses, but on the other hand, there may well be legitimate explanations for whatever happened. Listening to the anecdotal experiences from only one side of a controversy that has an interest in gaining an advantage will do no more than aggravate whatever problem actually exists.

There is an old adage that, if one is around long enough, things will begin to repeat themselves. I suspect that we are now there. During the mid-1970's, a similar issue arose out of a swell of alleged abuses of the independent medical examination process. Quite frankly, few of the alleged abuses were ever substantiated, but, nonetheless, the problem was addressed.

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From that controversy, a group of attorneys from the Multnomah County Bar Association and representatives of the medical community met together in an effort to resolve the problem. A companion issue related to the difficulty the plaintiff's attorneys were having in scheduling the testimony of treating physicians and the professional fees that they were charging. Out of this process, a policy was developed and it was at least customary that defense medical examinations would be attended only by the examining physician(s) and the plaintiff/patient and nothing would be recorded on behalf of a plaintiff. At the same time, something of a "truce" was reached with respect to the difficulties that had been experienced with physicians appearing as witnesses and how much they charge. It remained rather quiet for a long time.

It was during this same period of time that ORCP 44 was being developed with a fair amount of debate and analysis. That rule was adopted in 1978. It contemplates an order issued by the court specifying the time, place, manner, conditions and scope of the examination. This has largely been ignored because attorneys, at least for the most part, are able to work out the details without court intervention. The rule provides that, from the examination, the plaintiff is entitled to receive a medical report and no more. Surely, if it was intended that the plaintiff would be entitled to more than a medical report or would be entitled to have the plaintiff's attorney or some other observer present during the course of the examination, the Council on Court Procedures that developed the rule and the legislature that adopted it, would have so provided.

The discovery process incident to civil litigation has become notably more contentious with the passage of time. There are probably a lot of reasons for this, but, as it grows, we must recognize that any court rule that might be adopted must be balanced and fair.

The controversy seems to have its origin in personal injury claims arising out of auto accidents, slip and fall incidents and similar kinds of accidents. Invariably, it pits a treating physician or chiropractor appearing on behalf of the plaintiff against a physician retained on behalf of a defendant to address the injury claims made by the plaintiff. To an outsider, it probably seems clear that the physicians and/or chiropractors are advocates for those for

whom they appear and, because of this, balance and fairness to both sides is critical. Simply stated, a court rule should not create a potential for unfairness.

I now do little personal injury work where independent medical examinations are used. However, the majority of my work brings me into contact with many physicians of various specialties such that I have come to know their perception of the litigation process and their willingness to be involved.

I have found that most competent and skilled physicians are simply not willing to get involved in the litigation process in any capacity. Necessarily, that means that the number of physicians available and willing to do examinations and participate in the process, is very limited. Even their number has gone down rather dramatically of late and will continue to do so if the current trend continues. This could develop to the point where there are not enough qualified physicians to do this kind of work or the only physicians available are those who are not acceptable to either side. The balance needed for the litigation of personal injury cases will be at risk if participation means a transformation of the physician's clinic into an extension of the courtroom and the adversarial process.

The reasons that I perceive for what has occurred and likely will continue to occur in the future are as follows:

1) Most physicians view history-taking and the physical examination as a private process in a clinical setting. They believe strongly that the examination room should not be converted into something closely akin to a courtroom. They endeavor to keep the specter of litigation outside of the examination room and eliminate as much as possible the potential overlay and secondary gain influences.

   Those physicians with whom I have spoken strongly believe that if their examinations are somehow recorded or attended by litigation related observers, the clinical atmosphere will be destroyed. Further, under such circumstances, the validity of examination results will be highly suspect. Clearly, such an examination would be under significantly different circumstances than any examination conducted by the

treating physician which will likely never be subject to an audio or video tape recording or attended by a representative of the defendant. Again, balance is important.

The influence of litigation is probably inherent in this process no matter what is done. As an example, most competent physicians openly say that they will not undertake elective surgery related to litigation until the litigation is fully resolved. They have found that the need for surgery often disappears rather suddenly once the lawsuit is resolved. To add yet another layer of interference between the clinical atmosphere and the decision-making process from a medical standpoint will likely create even more imbalance and unfairness.

I have found that competent and skilled physicians who might be willing to conduct such examinations will not do so if the litigation process invades the examination room. The words used by those with whom I have spoken have been "staged", an "opportunity for a performance" and doing little more than creating yet another bit of evidence to conceivably be used by a plaintiff. If done in this fashion, they acknowledge that, if asked on cross examination about the relative validity of the examination findings, they would have to say that the findings have questionable validity. Plainly, this does not promote fairness.

2) There is a developing tactic by some plaintiff's attorneys to issue subpoenas duces tecum to physicians who do defense medical examinations to produce an extraordinary variety of income records and reports of medical examinations done in other cases that are totally irrelevant to the case in question. These efforts have been increasing, although they have met with mixed results before the courts that have been confronted with motions to quash and for protective orders. Competent and skilled physicians do not want and do not need this kind of intrusion and are unwilling to expend the effort that is required to respond to such subpoenas. They are simply not willing to transform their offices into litigation management centers where the expense far exceeds the revenue that could reasonably be generated.

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This is something rarely done with respect to the involvement of treating physicians even though they are involved in just as much litigation on behalf of their patients. Much like defense medical examiners, they, too, are paid for their time.

This situation has driven skilled and competent physicians away to such an extent that they are simply not willing to get involved. To add another layer of intrusion by recording their examinations or having representatives of the plaintiff observing the examination will drive even more away from the process. This is closely akin to the situation that existed during the mid-1970s when few physicians were willing to get involved in conducting medical examinations. I fear that we are destined for the same problems that then existed.

The risk of changing the current rule to allow audio and/or video tape recording of defense medical examinations or to allow observers is to deprive the defendants of having skilled and competent physicians conduct such examinations. This will produce imbalance and unfairness to the process. After all, no plaintiff's attorney would ever be willing to allow the history taking and physical examination of a treating physician to be somehow recorded on behalf of a defendant nor would they allow defense observers to sit in on such examinations. Defendants are no less entitled to an examination with some semblance of an impartial clinical setting than plaintiffs.

I am enclosing a copy of a motion and supporting points and authorities that we filed not long ago in a Clackamas County case to obtain an order for a defense medical examination. Also enclosed is the plaintiff's memorandum in opposition and a copy of the court's order. Between these documents, you will find there are citations to a sizeable amount of legal authority on the subject that may be helpful to you and your panel.

In my judgment, the rule should remain for purposes of defense medical examinations, that the plaintiff is not entitled to record the history or physical examination nor will an observer be present on behalf of the plaintiff. If a rule needs to be considered or adopted, I would suggest that

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consideration be given instead to whether subpoenas may be issued to physicians to produce voluminous examination and financial records regarding unrelated medical examinations.

I suspect that you will be receiving a fair amount of input addressing what may be a proposed rule change relating to defense medical examinations. Please consider what I have outlined above as a part of that process.

Very truly yours,

Larry A. Brisbee
LAB:dm
Enclosures

cc Chrys Martin
Jonathan Hoffman

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

RANDALL L. RYERSE and DIANE K. RYERSE, Plaintiffs, v. GEORGE A. HADDOCK and ROBERT KEECH ASSOCIATES, INC., an Oregon Corporation, Defendants.	No. 98-04-401 DEFENDANT KEECH'S MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF (ORCP 44A) Oral Argument Requested Expected Length: 15 Minutes

UTCR CERTIFICATION

The undersigned certifies that a good faith effort was made to confer with plaintiff regarding the issues in dispute. Oral argument is requested. Court reporting is not requested. It is estimated that 15 minutes will be required for oral argument.

MOTION

Defendant Robert Keech Associates, Inc. ("Keech") moves pursuant to ORCP 44A for an order requiring plaintiff Randall L.

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Ryerse to submit to a physical examination by Curt Kaesche, M.D., on April 28, 1999, at the hour of 12:45 p.m., at 1505 Division St., Oregon City, Oregon. The scope of the examination is to make a physical examination of plaintiff for the purpose of evaluating the injuries which plaintiff alleges arose from the motor vehicle accident which is the subject of this lawsuit. Defendant Keech further seeks provisions in the order that plaintiff shall not be accompanied by any person (including his attorney) in the examination room, and shall not make an audio or video tape recording of the examination. This motion is based on ORCP 44A and the subjoined memorandum of points and authorities.

Dated this 8th day of April, 1999.

Barbara L. Johnston, OSB# 91478
Of Attorneys for Defendant Keech

Trial Attorney:
Larry A. Brisbee, OSB# 67011

POINTS AND AUTHORITIES

1. **Background.**

Plaintiff's attorney has indicated by letter that he will agree to a physical examination of the plaintiff, but only if "a witness" is allowed to accompany plaintiff into the examination room and to make a tape recording or videotape of the examination. Defendant submits that such procedures would be highly inappropriate. This motion seeks an order pursuant to ORCP 44A for the examination, including explicit conditions that no one be

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allowed to accompany plaintiff into the examination room, and that no tape recording of the examination be allowed.

This is a lawsuit about an ordinary motor vehicle accident. There is nothing unusual about plaintiff's alleged injuries, and no suggestion has been made that defendant Keech will retain a biased or incompetent examiner. Yet plaintiff seeks the extraordinary measure of having a witness present in the examination room, and of memorializing the examination through tape recording or videotape.

2. Oregon law favors a medical examination unhampered by conditions such as plaintiff proposes.

ORCP 44 was adapted in 1978 from various sources, including FRCP 35. Prior to the adoption of ORCP 44, the Oregon Supreme Court decided the case of *Pemberton v. Bennett*, 234 Or 285, 288, 381 P2d 705 (1963), which addressed the question of whether counsel had a right to be present during a defense medical examination. The court held that it was a matter of discretion for the trial court, but that "a medical examination is not an occasion when the assistance of counsel is normally necessary." Even though the examiner was selected by defendant, the examiner was guided by medical ethics which required the examiner not to be influenced in such a way that the examiner's medical judgment and skill would be impaired. 234 Or at 288, n.1. There have been no final Oregon state decisions construing ORCP 44A or B since its adoption.[1]

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[1] *Tri-Met, Inc. v. Albrecht*, 308 Or 185, 777 P2d 959 (1989) construed ORS 656.325(1) to allow an observer at a workers compensation medical examination. This is distinguishable, however, both because the Supreme Court said it was not to be decided under ORCP 44, and because workers compensation benefits

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However, there is at least one indication of how a number of Oregon judges feel about the issue: the Motions Panel Rulings adopted by the Multnomah County Circuit Court Motions Panel.[2] Section 2(a) provides in relevant part:

> "A. Defense Medical Examinations (ORCP 44)
>
> "1. Presence of Counsel -- Plaintiff's counsel may not attend a defense medical examination.
>
> "2. Recording -- An examination may not be recorded or memorialized in any fashion other than the report required under ORCP 44B."

The foregoing consensus statements do not have the force of law, and certainly not in Clackamas County. But they do "represent the consensus of the Panel's members and are intended to provide

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are denied to claimants who obstruct an independent medical examination. Thus the presence or absence of such obstruction is an issue to be determined by the fact-finder. *See* discussion in *Romano v. II Morrow, Inc.*, 173 FRD 271, 274 (D.Or. 1997). Notably, the Supreme Court in *Tri-Met* did not disagree with the Court of Appeals' interpretation of ORCP 44 in a civil litigation context, *Tri-Met, Inc. v. Albrecht*, 95 Or App 155, 157-158, 768 P2d 421 (1989):

> "[T]he presence of an attorney at a medical examination is not favored. It could tend to prolong the examination and create other than a neutral setting for what is supposed to be an objective evaluation. * * * [T]he presence of an attorney at an independent medical examination ... would only serve to threaten the objective environment and ... could lead to obstruction of the examination." (citations omitted).

[2]The Multnomah County Motions Panel is a group of duly elected Circuit Court judges who regularly hear civil motions. They have reviewed, evaluated and reached a consensus on legal issues frequently raised by motion. A copy of their June 1998 rulings is attached hereto as Exhibit A.

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guidance to the Bar."

There is another problem with plaintiff's insistence on observing and recording the medical examination which has been addressed by Oregon law: it will operate to deprive defendant of its choice of physician examiners. Dr. Kaesche, defendant Keech's choice of examining physician, will refuse to conduct an examination under plaintiff's conditions. See accompanying affidavit of Larry A. Brisbee, and attached letter from Dr. Kaesche's office. Under Oregon law a defendant is presumptively entitled to choose the physician conducting the examination of the plaintiff and a claim of bias is not sufficient to defeat that choice. *Bridges v. Webb*, 253 Or 455, 457, 455 P2d 599 (1969). Cases from other jurisdictions have held that a plaintiff's claim of bias or prejudice is not sufficient to defeat that choice. *Douponce v. Drake, supra*, 183 FRD at 566; *Looney v. National Railroad Passenger Corp.*, 142 FRD 264 (D. Mass. 1992); *Timpte v. District Court*, 161 Colo. 309, 421 P2d 728 (1966). The Oregon court points out that defendant's choice of examiners should be honored, absent a valid objection, in the interests of "providing both parties with an equal opportunity to establish the truth." *Id.* A defendant is entitled to have plaintiff examined by a doctor "in whom defendant has confidence and with whom he can consult." *Id.*

As indicated in the affidavit of Larry A. Brisbee, Dr. Kaesche is a well-respected expert in orthopedics, and his office is in Oregon City, the location where the trial will be held. Mr.

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Brisbee indicates he is aware of other cases in which judges of this court have refused to require a plaintiff to appear for a defense medical examinations at a location remote from Clackamas County, even where the defendant has offered to pay all of the plaintiff's costs in connection with the examination. Indeed, remoteness of proposed examining physician is perhaps the only reason why a defendant's choice of physician has been rejected. *See, Looney, supra,* 142 FRD at 265-266. A remote examination, even were it allowed, also implicates significantly greater costs and witness scheduling difficulties in connection with the physician's appearance at trial, should that be required.

If this court allows plaintiff's conditions to be attached to the medical examination, then defendant will need to find another physician, someone who is not defendant's first choice. In addition, the time before trial is short (although a motion for a postponement has been filed herein), and there may be difficulties scheduling another appointment a meaningful time before trial.

3. Decisions under similar federal rule do not allow conditions such as plaintiff proposes.

ORCP 44A, relating to the order for the examination, and ORCP 44B, relating to the report, a copy of which is to be provided to the examined party, are almost word-for-word derived from FRCP 35. Accordingly, decisions construing the similar federal rule are important and persuasive. Almost uniformly, such decisions have prohibited the plaintiff's counsel from being present during the examination, have prohibited the presence of any other person, and

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have prohibited the tape recording (whether audio or video) of the examination, all absent unusual or compelling circumstances. A variety of reasons have been advanced for these holdings.

a. **Non-attorney observers not allowed because of tendency to interject adversarial atmosphere.**

For example, in *Romano v. II Morrow, Inc.*, 173 FRD 271, 274 (D.Or. 1997), the plaintiffs in a repetitive stress injury case wanted to have a non-attorney observer present during their physical examinations. The court (Frye, J.) noted that an observer, court reporter or recording device would constitute a distraction during the examination and would work to diminish the accuracy of the process. The presence of an observer would also "interject an adversarial partisan atmosphere into what should be otherwise a wholly objective inquiry." *Id.*, quoting from *Shirsat v. Mutual Pharm. Co.*, 169 FRD 68 (ED Pa. 1996). The court noted that the plaintiffs were not children, and had been examined by doctors many times in the past. There was no basis for their claim that they needed "reassurance" during the examination process. *Id.*

b. **Attorney observers also not allowed.**

Romano involved a proposal that a non-attorney observer be present during plaintiff's medical examination by defendant's expert. But there are even more compelling reasons for an attorney not to be present. (Plaintiff's counsel has not stated that he wishes to be present, but the phrase "a witness" is vague enough to encompass that possibility). If there is any matter during the examination which the plaintiff wants to contest, the attorney is

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necessarily a witness to such matter. Of course DR 5-102 prohibits a lawyer from acting as an advocate at trial if the lawyer is likely to be a witness. *Wheat v. Biesecker*, 125 FRD 479 (N.D. Ind. 1989).

Additionally, a lawyer is even more likely to create an adversarial or partisan atmosphere in an examination than would a non-lawyer observer. In *Wood v. Chicago M., St. Paul & Pacific R. Co.*, 353 NW2d 195, 197 (Minn. App. 1984) (construing Minn.R.Civ.P. 35.01, patterned after FRCP 35), the court noted:

> "To require routinely that attorneys be present during adverse medical examinations is to thrust the adversary process itself into the physician's examining room. The most competent and honorable physicians in the community would predictably be the most sensitive to such adversarial intrusions. The more partisan physicians might feel challenged to outwit the attorney. Thus, we fear that petitioner's suggested remedy would only institutionalize the abuse, convert adverse medical examiners into advocates, and shift the forum of controversy from the courtroom to the physician's examination room."

Before the advent of the Federal Rules of Civil Procedure, it was generally held that an attorney could be present during a physical examination. But if there was a rule or statute authorizing examinations and setting conditions for them, and the rule or statute did not provide for the presence of the attorney, the result was generally to forbid the attorney's presence. *Dziwanoski v. Ocean Carriers Corporation*, 26 FRD 595, 597 (D.Md. 1960). What was accomplished by those predecessor rules and statutes, and then by FRCP 35 was to

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> "lessen the danger of fraud by enabling the defendant to prepare himself properly for trial. It places a defendant on an equal footing as nearly as may be with a plaintiff, so far as concerns the opportunity to discover the true nature and extent of injury suffered."

(quoting *Bowing v. Delaware Rayon Co.*, 8 W.W. Harr. 206, 38 Del. 206, 190 A. 567, 569).

c. **Observers undermine the goal of putting defendants on an equal footing.**

The necessity to put defendants on an equal footing with plaintiff with regard to knowledge about the plaintiff's alleged injuries, is an important function of ORCP 44. The plaintiff's condition is, after all, something uniquely within the knowledge of the plaintiff. Neither defendants and their counsel, nor "a witness" on their behalf, are allowed to be present when the plaintiff is examined by the plaintiff's own physician or other expert. No tape recordings of such examinations are available to the defendants. Yet the plaintiff's physical condition is central to the claim being litigated. *See generally, Bridges v. Webb*, 253 Or 455, 457, 455 P2d 599 (1969) (endorsing the policy of putting both parties on an equal footing through defendant's choice of medical examiner.)

See also, Tomlin v. Holecek, 150 FRD 628, 632 (D. Minn. 1993), in which the court said that one of the central purposes of Rule 35 is "to provide a 'level playing field' between the parties in their respective efforts to appraise" the plaintiff's condition. To that end the party requesting the examination should be free from

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oversight by the opposing party. As the court noted:

> "To the extent that the Plaintiff regards [the examination by defendant's examiner] as providing an unacceptable degree of license with which she [the examiner] may question him at will, that degree of latitude is no greater than the liberality extended to the Plaintiff's consultants, who are expected to testify in this matter on the same general subject matter as may be expected from [defendant's examiner]."

d. Plaintiff has other options to challenge the credentials of the examiner, or outcome of the exam.

If plaintiff feels that Dr. Kaesche is biased, that the examination was inappropriate in some way, or that the wrong conclusion was reached, there are a number of avenues open to plaintiff to point that matter out to the court or to the jury. Evidence rules govern the admissibility of the report. Motions in limine are available to challenge the admissibility of the report, or parts of the report, prior to trial. Plaintiff will have his own expert witnesses to challenge any conclusions of Dr. Kaesche with which plaintiff may disagree. Plaintiff will have the opportunity to cross-examine Dr. Kaesche if defendant calls him as its witness. A number of different cases have pointed out the various methods available to plaintiff to challenge the findings of an FRCP 35 examination, *see, e.g., Dziwanoski* at 598 (plaintiff's counsel may time the examination, ask his client questions about the exam, cross examine the doctor, and inspect the report); *Warrick v. Brode*, 46 FRD 427, 428 (D. Del. 1969) (right to cross examine); *Wood*, supra, at 197 (right to receive report, cross-examine and introduce contrary expert testimony); *Holland v. U.S.*,

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182 FRD 493, 495-496 (D.S.C. 1998) (right to cross-examine, right for plaintiff to privately consult with plaintiff's own examiners) and *Douponce v. Drake*, 183 FRD 565 (D. Colo. 1998) (bias more appropriately a matter for cross examination at trial).

e. Videotaping or recording the examination should not be allowed.

Plaintiff here proposes that the examination be tape recorded or videotaped, in addition to having "a witness" present. Such a procedure would present an additional obstacle to defendant's right to examine plaintiff in a way designed to elicit the most frank and accurate results. As the court said in *Holland, supra*, 182 FRD at 496,

> "[T]he presence of a videographer could influence Mr. Holland [the plaintiff], even unconsciously, to exaggerate or diminish his reactions to Dr. Westerkam's [the physician's] physical examination. Mr. Holland could perceive the videotape as critical to his case and fail to respond in a forthright manner. In addition, the videotape would give Plaintiffs an evidentiary tool unavailable to Defendant, who has not been privy to physical examinations made of Mr. Holland by either his treating physicians or any experts he may have retained. Such a result undermines the purpose of Rule 35."

Accord, Douponce, supra, at 567; *Shirsat, supra*, at 70.

4. Lack of expert discovery in Oregon provides an additional reason why an examination should be ordered free of plaintiff's proposed conditions.

Under Oregon law there is an even more compelling reason why defendants should be afforded medical examinations without any interference or monitoring by plaintiff: there is no discovery of

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expert witnesses. At least under the federal rules, a defendant does have some access to plaintiff's expert witnesses, by interrogatory and deposition, to find out what they know about plaintiff's condition, what types of examinations and tests were conducted, and what conclusions the experts reached. But in Oregon, by contrast, none of that information is available to a defendant.

In Oregon, a defendant is not allowed to make inquiry of plaintiff's treating physician, because of the physician-patient privilege which is not ordinarily waived until the time of trial. *State ex rel Grimm v. Ashmanskas*, 298 Or 206, 213, 690 P2d 1063 (1984). No inquiry whatsoever can be made of any of plaintiff's other experts because of Oregon's rule prohibiting discovery of expert witnesses. *Stotler v. MTD Prods., Inc.*, 149 Or App 405, 943 P2d 220 (1997). Although the plaintiff himself may be deposed, he does not have the medical knowledge to provide any significant medical information about his condition, what examinations and tests were conducted, or the thought process by which his physicians reached their conclusions. In order to afford a defendant the fullest opportunity to evaluate plaintiff's alleged injuries, the examining physician must be given an unhampered opportunity to conduct a complete examination, without interference from witnesses or videographers. This examination is a defendant's only opportunity to independently evaluate what, medically, is actually wrong with the plaintiff.

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CONCLUSION

The decisions summarized above uniformly hold that under FRCP 35 and similar rules, such as ORCP 44, derived from FRCP 35, it is not appropriate to allow another person to accompany the plaintiff into a medical examination, nor to allow the recording of the examination by videotape, tape recorder or otherwise. The only exceptions are for highly unusual circumstances. This is an ordinary motor vehicle accident case, involving alleged injuries that are not highly controversial. There is no reason to depart from the usual rule.

There is good cause for the proposed examination. Plaintiff's damages are the primary matter in controversy, liability having already been determined. Defendants have no way to evaluate plaintiff's injuries first hand, except through the medical examination opportunity offered by ORCP 44.

Defendant Keech respectfully requests the court to grant the motion for a physical examination of plaintiff at the time and place set forth in the motion, and that plaintiff be prohibited

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from bringing his attorney or any other individual into the examination room, and from tape recording or videotaping the examination.

Dated this 8th day of April, 1999.

Barbara L. Johnston, OSB# 91478
Of Attorneys for Defendant Keech

Trial Attorney:
Larry A. Brisbee, OSB# 67011

April 8, 1999
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MOTIONS PANEL RULINGS

The Motions Panel of the Multnomah County Circuit Court has reviewed all prior Panel rulings to determine if a ruling should continue in effect and has adopted some new rulings. All current Panel rulings are set out below. Any or P el ruling not set out below is no longer in effect.. These rulings represent the consensus of the Panel's members l a. ıtended to provide guidance to the Bar. However, these rulings do not have the force of law and may be parted from by any judge in any case.

ARBITRATION

A. Amendment of Pleadings - Amendment of pleadings subsequent to an appeal from an arbitration award is ierally not allowed.

B. Motions - Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator. UTCR)40(3). A party may show cause (by application to the Presiding Court) why a motion should not be decided by the ıitrator.

C. Punitive Damages - Where the actual damages alleged are less than $25,000 (or for cases filed after Feb. 1, 1996,),000), the pleading of a punitive damages claim which may be in excess of the arbitration amount does not exempt a e from mandatory arbitration.

DISCOVERY

A. Defense Medical Examinations (ORCP 44)

1. Presence of Counsel - Plaintiff's counsel may not attend a defense medical examination.

2. Recording - An examination may not be recorded or memorialized in any fashion other than the report ıuired under ORCP 44B.

3. Vocational Rehabilitation Exams - Vocational rehabilitation exams will not be authorized unless they are rformed as part of an ORCP 44 examination by a physician or a psychologist.

B. Depositions

1. Attendance of Experts - Attendance of an expert at a deposition will generally be allowed, but will be ıiewed on a case-by-case basis upon motion of a party.

2. Attendance of Others - Persons other than the parties and their lawyers may attend a deposition, but a rty ıy apply to the court for the exclusion of witnesses.

3. Out-of-State Parties - A non-resident plaintiff is normally required to appear at plaintiff's expense in egon for deposition. Upon a showing of undue burden or expense, the court may order, among other things, that ıintiff's deposition occur by telephone with a follow-up personal appearance deposition in Oregon before trial.

A non-resident defendant is normally not required to appear in Oregon for deposition at their own expense. The position of a non-resident corporate defendant, through its agents or officers, shall normally occur in the forum of the rporation's principal place of business. However, the court may order that a defendant travel to Oregon at either rty's expense, to avoid undue burden and expense and depending upon such circumstances as whether the alleged nduct of the defendant occurred in Oregon, whether defendant was an Oregon resident at the time the claim arose, and ıether defendant voluntarily left Oregon after the claim arose.

4. Videotaping - Videotaping of discovery depositions is allowed with the requisite notice. The notice must signate the form of the official record. There is no prohibiiton against the use of BOTH a stenographer and a video, long as the above requirements are met.

5. Speaking Objections - The motion panel has recommended that the Multnomah County Deposition ıidelines be amended to state that "attorneys should not state anything more than the legal grounds for the objections preserve the record, and objection should be made without comment".

C. Experts

1. Discovery - Discovery under ORCP 36B(1) generally does not extend to the identity of non-medical experts.

D. Insurance Claims Files - An insurance claim file "prepared in anticipation of litigation" is protected by the work oduct doctrine regardless of whether a party has retained counsel. Upon a showing of hardship and need pursuant to RCP 36B(3) by a moving party, the court will inspect the file in camera and allow discovery only to the extent cessary to offset the hardship (i.e., not for production of entire file).

E. Medical Chart Notes

1. Current Injury - Medical records, including chart notes and reports, are generally discoverable in personal ju ctions. These are in addition to reports from a treating physician under ORCP 44. The party who requests an RC A report will be required to pay the reasonable charges of the practitioner for preparing the report.

2. Other/Prior Injuries - ORCP 44C authorizes discovery of prior medical records "of any examinations relating injuries for which recovery is sought." Generally, records relating to the "same body part or area" will be scoverable, and the court needs to be satisfied that the records sought actually relate to the presently claimed

EXHIBIT A

. Privileges

1. Psychotherapist-Patient - ORCP 44C authorizes discovery of prior medical records of any examinations ing to injuries for which recovery is sought. Generally, records relating to the same or related body part or area be scoverable. In claims for emotional distress, past treatment for mental conditions is generally discoverable. OL 504(4) (b) (A).

I. Tax Returns - In a case involving a wage loss claim, discovery of those portions of tax returns showing an earning ory, i.e., W-2 forms, is appropriate, but not hose parts of the return showing investment data or non-wage rmation.

. Witnesses

1. Identity - The court will require production of documents, including those prepared in anticipation of gation, reflecting the names, addresses and prepared in anticipation of litigation, reflecting the names, addresses l phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, rneys are encouraged to provide a "list" of occurrence witnesses, including their addresses and phone numbers.

2. Statements - Witness statements, if taken by a claims adjuster or otherwise in anticipation of litigation, are ject to the work product doctrine. Generally, witness statements taken within 24 hours of an accident, if there is an bility to obtain a substantially similar statement, are discoverable.

ORCP 36B(3) specifies that any person, whether a party or not, may obtain his or her previous statement ncerning the action or its subject matter.

J. Surveillance Tapes - Surveillance tapes of a plaintiff taken by defendant are generally protected by the work-oduct privilege, and not subject to production under a hardship or need argument.

VENUE

A. Change of Venue (forum non convenes) - Generally, the court will not allow a motion to change venue within the -county area (from Multnomah to Clackamas or Washington counties) on the grounds of forum non convenes.

B. Change of Venue - FELA - The state court will generally follow the federal guidelines regarding choice of venue r FELA cases.

MOTION PRACTICE

A ood Faith Conferences (UTCR 5.010) - Last minute phone messages or FAX transmissions immediately before e f g of a motion do not satisfy the requirements of a good faith effort to confer.

B. Copy of Complaint - The failure to attach a marked copy of the complaint to a Rule 21 motion pursuant to UTCR 020(2) may result in denial of the motions. UTCR 1.090.

C. Praecipe Requirement - Failure to properly praecipe a motion pursuant to SLR 5.015 may result in denial of the otion(s). UTCR 1.020.

DAMAGES

A. Non-economic Cap - The court will not strike the pleading of non-economic damages over $500,000 on authority of RS 18.560.

REQUESTING PUNITIVE DAMAGES

A. All motions to amend to assert a claim for punitive damages are governed by ORS 18.535, ORCP 23A, UTCR hapter 5 and Multnomah County SLR Chapter 5. Such motions also will be governed by summary judgment procedures ORCP 47 and related case law except where inconsistent with the statute and rules cited in the first sentence. nlargements of time are governed by ORS 18.535(4), ORCP 15D and UTCR 1.100.

B. A party may not include a claim for punitive damages in its pleading without court approval. A party may nclude in its pleading a notice of intent to move to amend to claim punitive damages. While discovery of a party's bility to pay an award of punitive damages is not allowed until a motion to amend is granted per ORS 18.535(5), the arties may conduct discovery on other factual issues relating to the claims for punitive damages once the opposing arty has been put on written notice of an intent to move to amend to claim punitive damages.

C. All evidence submitted must be admissible per ORS 18.535(3); evidence not objected to will be received. Testimony enerally must be presented through deposition or affidavit; live testimony will not be permitted at the hearing absent xtraordinary circumstances and prior court order.

D. If the motion is denied, the claimant may file a subsequent motion based on a different factual record (i.e. dditional or different facts) without the second motion being deemed one for reconsideration prohibited by Multnomah o y SLR 5.045.

E. For cases in mandatory arbitration, the arbitrator will decide any motion to amend to claim punitive damages. he arbitrator's decision may be reconsidered by a judge as part of de novo review under UTCR 13.040(3) and 13.100(1).

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

RANDALL L. RYERSE and DIANE K. RYERSE, Plaintiffs, v. GEORGE A. HADDOCK and ROBERT KEECH ASSOCIATES, INC., an Oregon Corporation, Defendants.	No. 98-04-401 **AFFIDAVIT OF LARRY A. BRISBEE**

STATE OF OREGON)
) ss
County of Washington)

I, Larry A. Brisbee, being first duly sworn on oath, depose and say:

I am the trial attorney for defendant Robert Keech & Associates, Inc. (for the damage phase). I make this affidavit in support of defendant Keech's motion for physical examination of plaintiff pursuant to ORCP 44A.

BRISBEE & STOCKTON
Attorneys at Law
139 N.E. Lincoln Street, P.O. Box 567
Hillsboro, Oregon 97123
Telephone (503) 648-6677

In preparation for trial, I have requested a physical examination of plaintiff's claimed injuries. Plaintiff's counsel indicated that he would agree to the examination, but only if plaintiff could take along a witness, and only if the examination could be videotaped. I am unwilling to agree to those conditions.

On behalf of defendant Keech, my choice of a physician to examine plaintiff is W. Curt Kaesche, M.D., both because he is a highly regarded orthopedist, and also because his office is in Oregon City, which will be convenient for the plaintiff and for the trial of this matter. I am aware of other Clackamas County cases in which judges have refused to require plaintiffs to be examined by physicians remote from Clackamas County, so that is another basis for my choice of Dr. Kaesche. I have had my assistant schedule an appointment for plaintiff's examination by Dr. Kaesche on April 28, 1999 at 12:45 p.m.

I have learned that Dr. Kaesche will object to plaintiff's conditions, and in fact will refuse to perform an examination under those conditions. Attached hereto as Exhibit 1 is a letter which I have received by fax from Fred Flaherty, administrator for Oregon Orthopedic & Sports Medicine Clinic, the group with which Dr. Kaesche practices. I would have requested written confirmation from Dr. Kaesche himself, but as the letter indicates, he is out of the country until April 26, 1999.

/ / /

/ / /

/ / /

BRISBEE & STOCKTON
Attorneys at Law
139 N.E. Lincoln Street, P.O. Box 567
Hillsboro, Oregon 97123
Telephone (503) 648-6677

I request that the court grant our motion for an examination on the indicated date, free of the conditions which plaintiff seeks to have imposed.

Larry A. Brisbee

SUBSCRIBED AND SWORN to before me this ___ day of April, 1999.

Notary Public for Oregon

April 8, 1999
I:\WP51\BLJ\KEECH\LAB.AFF

BRISBEE & STOCKTON
Attorneys at Law
139 N.E. Lincoln Street, P.O. Box 567
Hillsboro, Oregon 97123
Telephone (503) 648-6677

OREGON ORTHOPEDIC & SPORTS MEDICINE CLINIC, LLP

POST OFFICE BOX 519 • Oregon City • OR, 97045-0519

Physicians and Surgeons

W. Curt Kaesche, MD, PC
Jonathan H. Hoppert, MD, PC
Thomas P. McWeeney, MD, PC
Terrence A. Sedgewick, MD, PC
Marc R. Davidson, MD
David A. Buuck, MD

April 8, 1999

Larry Brisbee
P.O. Box 567
Hillsboro, OR 97123

Re: Ryerse V Haddock
Clackamas County No. 98 04 401

Dear Mr. Brisbee

Dr. Kaesche is out of the country until April 26, 1999 and can not be contacted at this time. He is scheduled for an IME April 28, 1999 with Mr. Ryerse.

It is Dr Kaesche's policy that the presence of a third party witness or attorney, voice or video taping is not allowed during the exam.

Thank you
Sincerely,

Fred Flaherty
Administrator

EXHIBIT 1
PAGE 1

Oregon City Office: 1505 Division St. • Oregon City, OR 97045 • Tel: (503) 656-0836 • Fax: (503) 656-9464
Tualatin Office: 19250 SW 65th, Suite 100 • Tualatin, OR 97062 • Tel: (503) 692-0366 • Fax: (503) 691-6167
Canby Office: 1185 S. Elm (Canby Clinic) • Canby, OR 97013 • Tel: (503) 656-0836 • Fax: (503) 266-6649
Milwaukie Office: 10202 SE 32nd Ave., Ste. 707 • Milwaukie, OR 97222 • Tel: (503) 652-1399 • Fax: (503) 652-1711

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT KEECH'S MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF (ORCP 44A)** on the following parties:

Michael P. Opton
Attorney at Law
621 S. W. Morrison Street, Suite 1440
Portland, Oregon 97205

Attorney for Plaintiff

James P. Dwyer
Attorney at Law
1220 S. W. Morrison, Suite 820
Portland, Oregon 97205

Attorney for Haddock as Plaintiff

Joseph W. Much
Attorney at Law
530 Center Street NE
Salem, Oregon 97301

Attorney for Haddock as Defendant

by mailing a true and correct copy thereof to said parties on the date stated below.

DATED April 8, 1999.

Barbara L. Johnston, OSB# 91478
Of Attorneys for Defendant Keech

BRISBEE & STOCKTON
Attorneys at Law
139 N.E. Lincoln Street, P.O. Box 567
Hillsboro, Oregon 97123
Telephone (503) 648-6677

Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

RANDALL L. RYERSE Plaintiff, v. GEORGE A. HADDOCK and ROBERT KEECH ASSOCIATES, INC., an Oregon corporation, Defendants.	Case No. 98-04-401 **PLAINTIFF'S RESPONSE TO DEFENDANT KEECH'S MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF**

Plaintiff Randall Ryerse, by and through his attorney Michael P. Opton and Opton, Galton & Underwood, hereby responds to defendant Keech's Motion for Physical Examination of Plaintiff (ORCP 44A).

INTRODUCTION

A defense medical examination is an adversarial proceeding where a physician of defendant's choosing is permitted to examine and interrogate a plaintiff. The defendant's physician routinely questions the plaintiff on his past medical history, current condition, and the events surrounding the injury with one purpose in mind: to elicit evidence that will reduce or eliminate the amount defendant must pay plaintiff for his injuries. The defendant's physician then prepares a DME report, after an unknown number of drafts, that presents the examination findings in a light most favorable to defendant. The defendant's physician often excludes any elicited responses from the plaintiff that would support plaintiff's case. The report prepared by defendant's physician is routinely used by the defendant both in settlement negotiations and at trial.

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Portland, Oregon 97205

Without Court-ordered safeguards permitting plaintiff's attorney's to attend and allowing plaintiff to audiotape record the exam, defendant's physician is free to prepare a report excluding information which would support plaintiff's case and defendant's physician is free to recite the information in a biased manner.

SUMMARY

(1) The Court should permit plaintiff Ryerse's legal counsel to attend the defendant's medical examination.

(2) The Court should permit plaintiff Ryerse to audiotape record the defendant's medical examination.

POINTS & AUTHORITIES

I. FACTUAL BACKGROUND.

Plaintiff Randall Ryerse filed the above-captioned action seeking recovery from defendant George A. Haddock and defendant Robert Keech Associates, Inc., for injuries he sustained in a motor vehicle accident occurring on September 4, 1997. Defendant Keech has moved the Court pursuant to ORCP 44A for an order requiring plaintiff Ryerse to submit to a physical examination by Curt Kaesche, M.D., a physician selected by defendant Keech. Defendant Keech has further moved the Court for an order forbidding plaintiff's attorney to accompany plaintiff in the examination room and forbidding plaintiff from audiotape recording the examination. Plaintiff Ryerse does not oppose a medical examination. Plaintiff does, however, request the Court permit plaintiff's legal counsel to accompany the plaintiff in the examination room and permit plaintiff to audiotape record the examination.

(II) ARGUMENT.

(a) Trial Court Determines Conditions For a Defendant's Medical Exam.

ORCP 44A provides in pertinent part that:

> " . . . the Court may order the party to submit to a physical or mental examination . . . The order may be made only on motion for good cause shown and upon notice of the person to

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be examined and to all parties **and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons to whom it is made."** [Emphasis Added]

Under ORCP 44A, the Trial Court decides the conditions under which a medical exam takes place. *Tri-Met, Inc. v. Albrecht*, 308 Or 185, 190, footnote 2, 777 P2d 959 (1989). The plaintiff's right to counsel at a medical examination is a matter within the discretion of the Trial Court. *Pemberton v. Bennett*, 234 Or 285, 287, 381 P2d 705 (1963). It is clearly within the Trial Court's discretion to allow plaintiff's legal counsel to accompany plaintiff to the DME and to permit plaintiff to audiotape record the examination.

(b) This DME Will Be an Adversarial Proceeding.

Defendant Keech asserts that defendant's physician is an expert witness and, therefore, the exam should not be monitored.

Defendant Keech is wrong in three respects. First, under ORCP 36, 39 and 43, an expert hired by a defendant may not participate in the questioning of a plaintiff, and may not examine plaintiff's property outside of the presence of plaintiff's counsel. Further, all depositions of opposing parties must be recorded by stenographic or other means.

Compelling a human being to subject himself to a physical or mental examination is one of the most invasive acts a Court can order. A party who is required to submit to this intrusion should be given at least the same protection we afford a machine or a parcel of real estate.

A more significant reason why monitoring is appropriate here is because the defendant, by labeling this doctor as its expert, has revealed its attitude about the physician selected. The defendant hired this doctor with the specific intent to assist defendants in the preparation and defense of plaintiff's damages claim, not as the Court and legislature envisioned, as an independent evaluator of plaintiff's conditions. The defendants, by claiming this doctor is their expert and by seeking expert privilege, have admitted that this physical exam will be an adversarial proceeding. As such,

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the plaintiff is entitled to all of the discovery safeguards and protections normally associated with any adversarial proceeding, namely rights to counsel and to a recorded record of the proceeding.

Finally, defendant Keech's assertion is incorrect because the Oregon Courts have held an ORCP 44A physician is not a party's expert. See *Nielsen v. Brown*, 232 Or 426, 431-444, 374 P2d 896 (1962) (Holding DME physician not entitled to expert witness protection and privilege.)

(c) The Court Should Permit Plaintiff Rverse's Legal Counsel to Attend the Defendant's Medical Examination.

(1) Statutory and case law supports allowing plaintiff's counsel to attend defendant's medical examination.

Defendant Keech asserts that judge's disfavor permitting an attorney to accompany his client to a defendant's medical examination. Oregon Courts, however, favor an attorney's presence at a defendant's medical exam when the examinee, the examiner, the nature of the exam or of the medical problem indicate it is desirable or necessary for counsel to be present. *Pemberton*, 234 Or at 288-289.

Here, defendant Keech has selected a physician with a long history of conducting medical exams for defense counsel and testifying on behalf of defendants. Defendant admits in his motion that he selected a physician "in whom defendant has confidence and with whom he can consult." See defendant Keech's Motion, page 5, lines 21-22. Defendant further admits that he viewed the physician as his own expert. Defendant Keech intends for this examination to be a second opportunity to depose plaintiff and to gather evidence to refute plaintiff's damages claims at trial. The nature of this exam will be an adversarial proceeding, and, as such, plaintiff should not be denied representation by legal counsel.

In *Tri-Met, Inc.*, the Oregon Supreme Court upheld a referee's decision that a worker's compensation claimant is entitled to legal representation at a DME. *Tri-Met, Inc.*, 308 Or at 190. The Court specifically rejected the appeals court reasoning that the presence of an attorney at the exam might affect the neutral setting or objective environment. *Tri-Met, Inc.*, 308

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Or at 188. The *Tri-Met* Court specifically held that there was not merit to the employer's assertion that a counsel's mere presence at a DME would taint the exam. *Id.* at 190. The rules providing for medical exams for worker's compensation claimants and for civil plaintiffs are similar. *See* ORS 656.325 and ORCP 44A. As such, a civil plaintiff should be afforded the same right to counsel as a worker's compensation claimant.

Many states recognize that an exam conducted by a physician who is hired by an adverse party is an adversarial proceeding and, therefore, provide that the person examined has the right to the presence of counsel. See *Langfeldt-Haaland v. Saupe Enterprises*, 768 P2d 1144 (Alaska 1989) (Examinee's lawyer may attend); *Munoz v. Superior Court of Santa Clara County*, 26 Cal. App.3d 643, 102 Cal. Rptr. 686 (1st Dist. 1972); *Brompton v. Poy-Wing*, 704 So.2d 1127 (Fla 4 DCA 1998) (Attorney generally may attend); *Broyles v. Reilly*, 695 So.2d 832 (Fla 2d DCA 1997); Michigan Court Rule 2.311 (Order for exam may allow plaintiff's counsel to attend); *Reardon v. Port Authority*, 132 Misc.2d 212, 503 N.Y.S.2d 233 (1986) (Attorney may attend mental exam); Okla Stat. tit. 12 Section 3235(D); *McCullough v. Mathews*, 918 P2d 25 (Okla. 1995) (Representative may be person's attorney); WA Court Rule 35(a) (Allows presence of attorney); *Tietjen v. Department of Labor & Industries*, 313 Wash. App. 86. 534 P2d 151 (1975) (Attorney may attend physical and mental exam).

Statutory and case law in Oregon and other jurisdictions support the plaintiff's position that counsel should be permitted to attend defendant's medical examination.

(2) Counsel's Presence Will Not Disrupt the Defendant's Medical Exam.

Defendant Keech claims that the presence of plaintiff's counsel will disrupt the plaintiff's medical examination. The Court in *Tri-Met*, however, found the assertion that the presence of an attorney at a DME would taint an exam "is patently absurd and only bolsters concerns over examiner objectivity." *Tri-Met, Inc.*, 308 Or at 190. The *Tri-Met* Court held that a party objecting to a counsel's presence must show "obstruction in fact". *Tri-Met, Inc.*, 308 Or at 190.

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Concern that an attorney's presence may hinder an examination is not sufficient reason to leave a plaintiff unprotected. *Scharff v. Superior Court*, 44 Cal. 508 282 P2d 896 (1955) (Holding that conditioning a plaintiff's right to proceed with her case on attending a DME unaccompanied by counsel imposed an unwarranted condition on her right to proceed to trial). Other states have rejected defendant Keech's argument that the presence of plaintiff's counsel will interfere with an exam.

Defendant Keech attempts to show obstruction because defendant's physician will not conduct the medical exam if the Court permits plaintiff's counsel to be present. The *Tri-Met* Court, however, specifically stated that a physician's objection to counsel's presence is not obstruction of the examination. *Id.* at 189. Further, defendant's choice of physician is not an absolute right. Defendant is only entitled to have plaintiff examined by a doctor of defendant's choice in the absence of a valid objection. *Bridges v. Webb*, 253 Or 455, 458, 455 P2d 599 (1969). The *Bridges* Court specifically delineated that the manner, scope or conditions of a proposed exam can be the basis of substantial objections. *Bridges*, 253 Or at 456-457.

Here, plaintiff has detailed how the proposed exam will be an adversarial proceeding because of the physician's history of conducting exams on behalf of defendants and because defendant Keech has admitted that he views defendant's physician as his expert witness. As the plaintiff has provided evidence of substantial objections to this physician, the plaintiff is entitled to the presence of counsel at the examination.

(c) The Court Should Permit Plaintiff Rverse to Audiotape Record the Defendant's Medical Examination.

Defendant Keech objects to plaintiff's audiotape recording of defendant's medical examination. The defendant's medical examination should be audiotaped to ensure the accuracy of the DME report. Defendant's physician will, as part of the exam, ask plaintiff a variety of questions concerning the plaintiff's medical history, plaintiff's injuries, and perhaps even details of the events surrounding plaintiff's injury.

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ORCP 39 provides for the recording of deposition testimony. If plaintiff is denied the opportunity to record the exam, the only record of the exam is the written report prepared by defendant's examining physician. The defendant's statement that he intends to use this physician as defendant's expert is an admission that this is an adversarial proceeding. It is within the discretion of the Trial Court to decide the conditions under which a medical exam is to take place. *Tri-Met, Inc.*, 308 Or at 190. The Court should provide safeguards that ensure the accuracy of the defendant's medical examination report.

Several states currently allow audio, video, or stenographic recording of exams. *See* Arizona R. Civ. P. 35(a); Calif. Code of Civil Procedure §2032(g); *Jacob v. Chaplin*, 639 N.E.2d 1010 (Ind. 1994); WA Court Rule 35(a) (audiotape recording); Arizona R. Civ. P. 35 (videotape recording upon showing of good cause); *Broyles v. Reilly*, 695 So.2d 832 (Fla. 2nd DCA 1997) (videotape recording permitted); Calif. Code of Civil Procedure, §2032(g) (stenographic recording of exams permitted).

III. CONCLUSION.

For the foregoing reasons, defendant Keech's Motion for Physical Examination should be denied.

DATED this 16TH day of April, 1999.

OPTON, GALTON & UNDERWOOD

Michael P. Optón, OSB #72187
Michael L. Gangle, OSB #97266
Of Attorneys for Plaintiffs

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OPTON, GALTON & UNDERWOOD
621 S.W. Morrison - Suite 1440
Portland, Oregon 97205

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANT KEECH'S MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF on the attorneys of record, to-wit:

Joe W. Much
Spooner, Much & Ammann
Equitable Center Bldg., Suite 722
530 Center St. NE
Salem, OR 97301-3740

Larry Brisbee
Brisbee & Stockton
139 NE Lincoln St.
P.O. Box 567
Hillsboro, OR 97123

on Friday, April 16, 1999 by mailing to said attorneys a true copy thereof, certified by me as such, contained in a sealed envelope, with postage prepaid, addressed to said attorneys at their last known addresses as noted above, and deposited in the post office at Portland, Oregon on said day.

OPTON, GALTON & UNDERWOOD

Michael P. Opton, OSB #72187
Michael L. Gangle, OSB #97266
Of Attorneys for Randall Ryerse

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

RANDALL L. RYERSE and DIANE K. RYERSE,	)	
Plaintiffs,	)	No. 98-04-401
v.	)	ORDER
GEORGE A. HADDOCK and ROBERT KEECH ASSOCIATES, INC., an Oregon Corporation,	)	
Defendants.	)	

This matter came on regularly before the court and undersigned judge on April 19, 1999, upon the motion of the defendant Robert Keech Associates, Inc. for an order pursuant to ORCP 44 directing the plaintiff, Randall Ryerse, to submit to a medical examination by Curt Kaesche, M.D., at his offices on May 6, 1999, at 7:45 a.m. and for a further order that no attorney or other person on behalf of the plaintiffs shall be in attendance during the medical examination and the medical examination shall not be recorded by audiotape or videotape by or on behalf of the plaintiffs. The plaintiff appeared by and through Michael L. Gangle, of their attorneys. The defendant, Robert Keech Associates, Inc., appeared

BRISBEE & STOCKTON
Attorneys at Law
139 N.E. Lincoln Street, P.O. Box 567
Hillsboro, Oregon 97123
Telephone (503) 648-6677

by and through Larry A. Brisbee, of its attorneys. The defendant George A. Haddock appeared by and through Joe Much, of his attorneys.

The Court considered the legal authorities submitted on behalf of the parties and the arguments of counsel and thereupon concluded that the motion of the defendant Robert Keech Associates, Inc., was well taken and should be allowed in each particular.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

(1) In accordance with ORCP 44, the plaintiff, Randall Ryerse, shall appear at the offices of Curt Kaesche, M.D., on May 6, 1999, at 7:45 a.m. and, thereafter, undergo the medical examination scheduled for that time and place.

(2) No person other than the plaintiff and the medical personnel associated with the offices of Dr. Kaesche shall be present for purposes of the medical examination.

(3) The medical examination shall not be recorded by audiotape or videotape by or on behalf of the plaintiff.

(4) Upon completion of the medical examination, a medical report shall be prepared by Dr. Kaesche and a copy provided to the plaintiff's attorney.

DATED this ____ day of April, 1999.

Robert R. Selander
Circuit Judge

Prepared by:

Larry A. Brisbee, OSB #67011

BRISBEE & STOCKTON
Attorneys at Law
339 N.E. Lincoln Street, P.O. Box 567
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Telephone (503) 648-6677

MARCUS

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

JANICE R. WILSON
JUDGE

PHONE (503) 248-3069
FAX (503) 248-3425

M E M O R A N D U M

To: Motion Panel Judges
From: Janice R. Wilson
Date: January 18, 2000
Subject: ORCP 44 Exams – Input from OTLA

Attached is a letter form Tom D'Amore concerning ORCP 44 exams. There are several letters. affidavits and declarations attached. The declaration of Mr. Fulton was missing the referenced exhibits. I've asked Mr. D'Amore to send those to me and I'll circulate them as soon as I receive them.

CHRYS A. MARTIN
E-mail: chrys.martin@bullivant.com
Direct Dial: 503-499-4420

MARCUS

Bullivant | Houser | Bailey

A Professional Corporation

January 6, 2000

Honorable Janice R. Wilson
Circuit Court Judge
Multnomah County Circuit Court
1021 SW Fourth Avenue
Portland, Oregon 97204

RE: Motion Panel - IMEs

Dear Judge Wilson:

Enclosed is a transcript from a recent ruling by a trial court judge in Clark County allowing a protective order preventing a treating practitioner from attending an IME. The discussion highlights the problems inherent in such a situation.

Sincerely,

Chrys A. Martin

CAM:cv/dm
Enclosure
cc: OADC Members (w/o enc)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

SHAFFER, DIEDRE,)

Plaintiff,)

v.) No. 96-2-0055-9

HOWINGTON, RICHARD, et ux,)

Defendants.)

VERBATIM REPORT OF PROCEEDINGS

BEFORE: HONORABLE JAMES D. LADLEY, Judge

APPEARANCES: Stanley F. Horak, Attorney for the Plaintiff

Douglas F. Foley, Attorney for the Defendants

April 2, 1999

THE COURT: Are you going to try a case on Monday, Mr. Foley?

MR. FOLEY: Before Judge Harris, Your Honor.

THE COURT: I thought you were.

MR. HORAK: Not this one. I hope not.

THE COURT: No. No.

MR. FOLEY: This is our motion, Your Honor. I think that for some reason our motion didn't get noted or filed. I did file it.

THE COURT: It is probably in the file, Counsel. And I would apologize because the only thing I saw was Mr. Horak's motion coming back and I didn't realize --

MR. HORAK: I have a copy of his motion if that helps the Court.

THE COURT: No, it's in here. It's Defense Motion for Protective Order.

MR. FOLEY: This is sort of a continuing discussion from our motion last time on trying to keep our limited pool of IME doctors intact. It's a problem for us. We have just a handful of people willing to come to court and take the slings and arrows. I respect Stan for trying and for what he's doing, but looking at the financial information, which he's entitled to do in a summary fashion, I am against that too. He sent me written deposition questions, and I will provide that to him. Will not give him tax returns and things of that

nature.

MR. HORAK: That's already been decided.

MR. FOLEY: What happened at the IME, she showed up with a chiropractor, which is the most unusual thing that I have had happen at an IME, and Dr. Peterson took extreme umbrage to that and I do too not just because he's a chiropractor but because I think it's outside the rule and also because it is an attempt conceivably to throw an expert witness into this case again. I thought he was a treating chiropractor. As it turns out, he's just a chiropractor that walked around in this lady's back pocket I guess for the purpose of this examination, and my doctor didn't want to do it. He thought that was improper, and as I think the Court may understand, being second guessed by a chiropractor coming at the whole injury syndrome from a different perspective would be I think totally improper. We don't send our IME doctors to their examinations of their doctors. The Court has control over the situation. I did not have time to do a long brief on this, but in the case of -- in the comments on physician examination you --

THE COURT: What are you looking at?

MR. FOLEY: It's the practice book, Orland and Tegland, Volume 4, page 223. It says that the patient who's -- psychiatric exam under CR 35. The claimant attorney can insist on being present but he's not entitled to have his

spouse or other family members present at the time. Under the comments to the rule in the pocket part it states, "Committee believed that an independent medical examination can be a stressful and intimidating experience for a party and thus that the person being examined should be able to have a representative present if for no other reason than for moral support. In addition, however, it's argued that such an examination may often result in ex parte discovery with the examiner asking a number of questions regarding the party's history. If only the answers and not the questions are recorded, it is difficult to tell if the examiner's report contains errors. An observer may be able to act as a secondary resource in this situation. But for this reason the proposed amendment also provides that either the party or the party's representative may make an audiotape recording of the examination, though such recording must not be allowed to interfere or obstruct the examination."

We have no objection to obviously an audio recording and somebody sitting as an observer. The problem with the chiropractor is that it's going beyond the witness level, and basically this is a witness ruling. In other words, you get to have somebody there to make a record of what happens, not to develop expert testimony for an additional layer of expert discovery or expert attack.

As the Court is fully also aware, and I've got

to make this as a public policy argument in addition to my argument based on the rule, is that as I said when I started out, I have a very limited pool of doctors who are willing to do that, and there's even a more limited pool of, quite frankly, qualified doctors who are articulate, who can explain their position to the jury, who may or may not have a certain belief system about medicine versus chiropractic, which I'm entitled to provide to the jury, and I don't believe that the purpose of the rule's fulfilled by allowing an expert to come along for the purpose of developing expert testimony as opposed to the witness representation, which is allowed by the rule, to simply make sure that there is a record suitable for the plaintiff's needs to say what did or didn't happen. And so to introduce another layer of expert intrusion into basically kind of an objective witness function and a moral support function is changing the nature of the game.

If my doctors will not allow -- they won't do these in front of chiropractors. I don't know how many other claimants' attorneys are in the room, maybe one or more. This immediately spreads like wildfire. Everyone knows everyone in this community, and it really depletes our ability to defend.

THE COURT: Mr. Horak.

MR. HORAK: Well, Your Honor, kind of amazing, the Tegland case that he cited predates the change in the rules. In fact, that's what the rule was based on, so that's not

really precedent in this case, and it did say a person had the right to have an observer present. If you look at the commentary that we have --

THE COURT: I'm reading it.

MR. HORAK: -- overreaching and inaccurate reporting is what they're looking for. That's the purpose of the rule. What Mr. Foley is saying and what Dr. Peterson has said is that all licensed chiropractors from the state of Washington, if you're licensed by the State of Washington to be a chiropractor that you have knowledge about what an examination is, what a history is, how to do an orthopedic test. You're barred from observing to see whether or not we did the test properly or not.

THE COURT: What Mr. Foley's talking about, Counsel, and I think there is equity on both sides of the argument, he's concerned now that Hagen -- isn't that your expert?

MR. FOLEY: Peterson.

MR. HORAK: Thomas Kelly was the person to observe.

THE COURT: Thomas Kelly is going to come in and when he talks -- if he's making an issue with the evaluation, he's going to do it as a chiropractor and he's going to do it as an expert. So then what you're doing is sending an expert to his IME. And what you're doing then is requiring him to have an expert on top of your expert to contradict your expert. Then you go right on out. But you are sending an

expert to the IME.

MR. HORAK: That's true. If I sent an orthopedic, he would object to an orthopedic doctor watching that orthopedic evaluation? Would he have the same basis then?

THE COURT: You're adding a whole layer of experts and again what you're doing of course, Mr. Horak, is just exactly what Mr. Foley is saying, and I know you don't care because --

MR. HORAK: I don't agree with what he's saying.

THE COURT: Well, of course. You're blunting his expert's desire to participate in these things.

MR. HORAK: No. Not at all. His expert can examine. He has to follow the Washington rules, and there are plenty of experts willing to follow the Washington rules. The purpose of having the observer there is for knowledge. What we're saying is he's not interfering, he's not biased, he's not prejudiced.

THE COURT: He's sitting there as an expert. He's going to come over here and he's going to give opinions and he's going to be subject to the expert witness instruction, which is not -- he's just not a common person.

MR. HORAK: But he can tell whether the test was done properly. Whether he did the range of motion test properly. Whether he didn't do it properly. He did all of these tests. Better to have an observer that has no training

in medical skills at all?

THE COURT: When you're the treating physician, treating your client, is his expert entitled to be there to say that Dr. Bell did the range of motion test properly?

MR. HORAK: His expert already gives that opinion in trial: looking at the medical records, these tests were not proper.

THE COURT: That's the point.

MR. HORAK: That's what his expert already does.

THE COURT: That's the point. That's the point. They're doing it on the basis of the record. They're not there investigating. Well, Counsel, it's just a gut call on this thing. I don't think there's a right or a wrong but I would agree with you, Mr. Foley, on this. I think to send an expert over to participate in the examination is outside the scope and intent of the rule.

MR. FOLEY: I'll submit an order. Thank you, Your Honor.

THE COURT: That's the way I'm going to rule on it. And this may be something that the appellate court's going to have to take up, Counsel, because we know, I know, you know because you gentlemen are in it, that the discovery process is taking over and is becoming more important than the claim itself and then the trial itself. And it's a question of who has an edge. And that's what's driving these things and

that's what I think this is. This is intimidation, and I'm not blaming you, Stan. But that's what I think it is and I don't think it's what the rule intended. So I'll grant your motion, Counsel.

MR. FOLEY: Thank you, Your Honor.

MR. HORAK: Thank you.

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CERTIFIED A TRUE TRANSCRIPT James A. Frame

James A. Frame, Official Reporter

James A. Frame, RPR
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R. Ashworth,
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January 13, 2000

Honorable Janice R. Wilson
Circuit Court of the State of Oregon
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, OR 97204

RE: Input from OTLA related to ORCP 44 Examinations

Dear Judge Wilson:

OTLA President Linda Eyerman asked that I respond and provide information in response to your letter regarding ORCP 44 examinations, dated December 16, 1999, to Ms. Eyerman and OADC President Chrys Martin. Ms. Eyerman will respond under separate cover.

I am a member of the OTLA Board of Governors and serve as chair of the Motor Vehicles Section of OTLA. I am also licensed to practice in Washington and California; thus, I am somewhat familiar with the defense medical examination (DME) procedures in those states. I enclose copies of the applicable Washington statute (CR 35) and applicable California statute (CCP 2032(g)). The Motion Panel advisory rulings are at odds with procedures in these states.

In order to better understand how DMEs are conducted in other states, OTLA requested written comments from former Washington Superior Court Judge John N. Skimas and Washington practitioners. [Please see enclosed.] As you may know, Judge Skimas is now performing alternative dispute resolution in Oregon and Washington. We selected Washington because of its close proximity and because many of the DME doctors in Multnomah County also perform DMEs for Washington cases and under Washington law. Because of the high number of DME doctors in Portland compared to Vancouver, it is common to use Portland DME doctors for Clark County, Washington cases. We have found that the same DME doctors will allow recording and the presence of a representative for cases filed in Washington (as they are expressly required to do by CR 35), but they will not allow the same procedural safeguards for cases filed in Multnomah County.

Speaking for myself, I believe the published Motion Panel advisory rulings are <u>not</u> appropriate. I am not familiar with many instances in the civil or criminal law where a

party is denied basic procedural safeguards such as the presence of counsel and/or a record of a proceeding. In many motor vehicle cases, the sole or primary issue is the extent of injury. The DME physician is typically the primary witness to test the plaintiff's injury and credibility. In these cases, DME physicians (and medical review corporations) sometimes require examinees to fill out forms or make diagrams of their injury or pain as part of a DME. They may ask questions about property damage, impact speeds, and even liability. Putting aside the issue of whether these actions are a proper part of a medical examination, how is an attorney expected to provide effective representation without a record of the questions asked and answers given?

For the above reasons, a change in the Motion Panel advisory rulings regarding the presence of counsel and recording defense medical examinations would be appreciated. I believe the Washington and California rules would provide good models for the Motion Panel to review.

If you have any questions regarding the above, please do not hesitate to contact me.

Very truly yours,

D'Amore & Associates, P.C.

Thomas D'Amore

Enclosures
cc: Linda Eyerman

D'AMORE & ASSOCIATES
Trial Lawyers

*1999 Superior Court Civil Rules. CR 35

WEST'S WASHINGTON LOCAL RULES OF COURT AND WEST'S WASHINGTON COURT RULES
PART IV. RULES FOR SUPERIOR COURT
SUPERIOR COURT CIVIL RULES (CR)
5. DEPOSITIONS AND DISCOVERY (Rules 26-37)

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the 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. The party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination. Unless otherwise ordered by the court, the party or the party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. 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 that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

*2000 (2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

[Amended effective July 1, 1972; September 17, 1993.]

California Code of Civil Procedure section 2032

2032. (a) Any party may obtain discovery, subject to the restrictions set forth in Section 2019, by means of a physical or mental examination of (1) a party to the action, (2) an agent of any party, or (3) a natural person in the custody or under the legal control of a party, in any action in which the mental or physical condition (including the blood group) of that party or other person is in controversy in the action. (b) A physical examination conducted under this section shall be performed only by a licensed physician or other appropriate licensed health care practitioner. A mental examination conducted under this section shall be performed only by a licensed physician, or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders. Nothing in this section affects tests under the Uniform Act on Blood Tests to Determine Paternity (Chapter 2 (commencing with Section 7550) of Part 2 of Division 12 of the Family Code). (c) (1) As used in this subdivision, plaintiff includes a cross-complainant, and defendant includes a cross-defendant. (2) In any case in which a plaintiff is seeking recovery for personal injuries, any defendant may demand one physical examination of the plaintiff, provided the examination does not include any diagnostic test or **procedure** that is painful, protracted, or intrusive, and is conducted at a location within 75 miles of the residence of the examinee. A defendant may make this demand without leave of court after that defendant has been served or has appeared in the action, whichever occurs first. This demand shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the physician who will perform the examination. (3) A physical examination demanded under this subdivision shall be scheduled for a date that is at least 30 days after service of the demand for it unless on motion of the party demanding the examination the court has shortened this time. (4) The defendant shall serve a copy of the demand for this physical examination on the plaintiff and on all other parties who have appeared in the action. (5) The plaintiff to whom this demand for a physical examination has been directed shall respond to the demand by a written statement that the examinee will comply with the demand as stated, will comply with the demand as specifically modified by the plaintiff, or will refuse, for reasons specified in the response, to submit to the demanded physical examination. Within 20 days after service of the demand the plaintiff to whom the demand is directed shall serve the original of the response to it on the defendant making the demand, and a copy of the response on all other parties who have appeared in the action, unless on motion of the defendant making the demand the court has shortened the time for response, or unless on motion of the plaintiff to whom the demand has been directed, the court has extended the time for response. (6) If a plaintiff to whom this demand for a physical examination has been directed fails to serve a timely response to it, that plaintiff waives any objection to the demand. However, the court, on motion, may relieve that plaintiff from this waiver on its determination that (A) the plaintiff has subsequently served a response that is in substantial compliance with paragraph (5), and (B) the plaintiff's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect. The defendant may move for an order compelling response and compliance with a demand for a physical examination. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel response and compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a plaintiff then fails to obey the order compelling response and

compliance, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction the court may impose a monetary sanction under Section 2023. (7) If a defendant who has demanded a physical examination under this subdivision, on receipt of the plaintiff's response to that demand, deems that any modification of the demand, or any refusal to submit to the physical examination is unwarranted, that defendant may move for an order compelling compliance with the demand. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (8) The demand for a physical examination and the response to it shall not be filed with the court. The defendant shall retain both the original of the demand, with the original proof of service affixed to it, and the original response until six months after final disposition of the action. At that time, the original may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period. (d) If any party desires to obtain discovery by a physical examination other than that described in subdivision (c), or by a mental examination, the party shall obtain leave of court. The motion for the examination shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination. The motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt to arrange for the examination by an agreement under subdivision (e). Notice of the motion shall be served on the person to be examined and on all parties who have appeared in the action. The court shall grant a motion for a physical or mental examination only for good cause shown. If a party stipulates that (1) no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed, and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages, a mental examination of a person for whose personal injuries a recovery is being sought shall not be ordered except on a showing of exceptional circumstances. The order granting a physical or mental examination shall specify the person or persons who may perform the examination, and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination. If the place of the examination is more than 75 miles from the residence of the person to be examined, the order to submit to it shall be (1) made only on the court's determination that there is good cause for the travel involved, and (2) conditioned on the advancement by the moving party of the reasonable expenses and costs to the examinee for travel to the place of examination. (e) In lieu of the procedures and restrictions specified in subdivisions (c) and (d), any physical or mental examination may be arranged by, and carried out under, a written agreement of the parties. (f) If a party required by subdivision (c), (d), or (e) to submit to a physical or mental examination fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may, on motion of the party, impose a monetary sanction under Section 2023. If a party required by subdivision (c), (d), or (e) to produce another for a physical or mental examination fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including

the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023, unless the party failing to comply demonstrates an inability to produce that person for examination. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023. (g) **(1) The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audiotape any words spoken to or by the examinee during any phase of the examination. This observer may monitor the examination, but shall not participate in or disrupt it. If an attorney's representative is to serve as the observer, the representative shall be authorized to so act by a writing subscribed by the attorney which identifies the representative. If in the judgment of the observer the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend it to enable the party being examined or producing the examinee to make a motion for a protective order. If the observer begins to participate in or disrupt the examination, the person conducting the physical examination may suspend the examination to enable the party at whose instance it is being conducted to move for a protective order. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If the examinee submits or authorizes access to X-rays of any area of his or her body for inspection by the examining physician, no additional X-rays of that area may be taken by the examining physician except with consent of the examinee or on order of the court for good cause shown. (2) The examiner and examinee shall have the right to record a mental examination on audio tape. However, nothing in this article shall be construed to alter, amend, or affect existing case law with respect to the presence of the attorney for the examinee or other persons during the examination by agreement or court order.** (h) If a party submits to, or produces another for, a physical or mental examination in compliance with a demand under subdivision (c), an order of court under subdivision (d), or an agreement under subdivision (e), that party has the option of making a written demand that the party at whose instance the examination was made deliver to the demanding party (1) a copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner, and (2) a copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner. If this option is exercised, a copy of these reports shall be delivered within 30 days after service of the demand, or within 15 days of trial, whichever is earlier. The protection for work product under Section 2018 is waived, both for the examiner's writings and reports and to the taking of the examiner's testimony. If the party at whose instance the examination was made fails to make a timely delivery of the reports demanded, the demanding party may move for an order compelling their delivery. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey an order compelling delivery of demanded medical reports, the court may make those orders that are just, including the

imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to those sanctions, the court may impose a monetary sanction under Section 2023. The court shall exclude at trial the testimony of any examiner whose report has not been provided by a party. (i) By demanding and obtaining a report of a physical or mental examination under subdivision (h), or by taking the deposition of the examiner, other than under subdivision (i) of Section 2034, the party who submitted to, or produced another for, a physical or mental examination waives in the pending action, and in any other action involving the same controversy, any privilege, as well as any protection for work product under Section 2018, that the party or other examinee may have regarding reports and writings as well as the testimony of every other physician, psychologist, or licensed health care practitioner who has examined or may thereafter examine the party or other examinee in respect of the same physical or mental condition. (j) A party receiving a demand for a report under subdivision (h) is entitled at the time of compliance to receive in exchange a copy of any existing written report of any examination of the same condition by any other physician, psychologist, or licensed health care practitioner. In addition, that party is entitled to receive promptly any later report of any previous or subsequent examination of the same condition, by any physician, psychologist, or licensed health care practitioner. If a party who has demanded and received delivery of medical reports under subdivision (h) fails to deliver existing or later reports of previous or subsequent examinations, a party who has complied with subdivision (h) may move for an order compelling delivery of medical reports. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey an order compelling delivery of medical reports, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to the sanction, the court may impose a monetary sanction under Section 2023. The court shall exclude at trial the testimony of any health care practitioner whose report has not been provided by a party ordered to do so by the court. (k) Nothing in this section shall require the disclosure of the identity of an expert consulted by an attorney in order to make the certification required in an action for professional negligence under Sections 411.30 and 411.35.

JOHN N. SKIMAS P.C.
Superior Court Judge, Ret.
201 N.E. Park Plaza Drive, Suite 210
Vancouver, WA 98684-5808
(360) 944-7205

October 27, 1999

Thomas D'Amore
Attorney at Law
506 SW Sixth Avenue, Suite 700
Portland, Oregon 97204-1527

Re: OTLA DME Task Force

Dear Mr. D'Amore:

Enclosed is a declaration which I hope will be of assistance to you and your task force in discussing the desirability of amending ORCP 44. If I may be of further assistance, please do not hesitate to give me a call.

Very truly yours,

John N. Skimas

DECLARATION OF JOHN N. SKIMAS

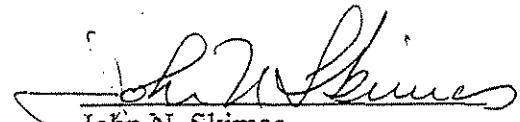
I, John N. Skimas, declare as follows:

From 1971 through 1992 I served as a Superior Court Judge in Vancouver, Clark County, Washington. During my tenure I had been requested on several occasions to authorize attendance at a CR 35 medical examination by a representative of claimants. Without express authority under the rule such a request was granted only on a showing of special circumstances. Occasionally a family member was permitted to attend instead of a representative mainly for moral support. The practice of granting these requests lacked uniformity and varied among judges. Hearings on these matters took valuable court time and increased the costs to the parties.

CR 35(a) was amended in 1993 to allow for the presence of a claimant's representative at a requested medical examination and for recording. Since 1992 I have participated in over 600 mediation/arbitration proceedings in Oregon and Washington cases where defense medical examinations were frequently involved. Some of the Washington cases had representatives present during medical examinations and I cannot recall any issue ever having been raised regarding attendance by a claimant's representative. I have also discussed the matter with two of my former colleagues and they have not experienced any claims of abuse or problems with the operation of the current rule other than a rare complaint by a doctor who does not understand or appreciate the purpose of the rule.

I certify under the penalty of perjury under the law of the State of Washington that the foregoing is true and correct.

Dated this 27th day of October, 1999.



John N. Skimas

DECLARATION OF JOHN ALEXANDER REGARDING OBSERVERS AT CIVIL RULE 35 MEDICAL EXAMINATIONS

John Alexander, declares as follows:

1. My name is John Alexander. I am an attorney licensed in the state of Washington. I am also licensed in the state of California and have been practicing in Washington state since 1978. The statements made by me are based upon my personal knowledge and I am competent to testify to the same in a court of law.

2. For the past 14 years I have practiced personal injury law exclusively. The vast majority of my experience has been as a plaintiff's personal injury lawyer; however, I have also been retained by insurance companies to represent defendants.

3. For the past six years, it has been my practice to send an observer to attend the physical examinations of my clients pursuant to the provisions of Civil Rule 35. For the past six months, it has become my practice to make certain that the full proceedings of the medical examination in the presence of my client be tape recorded by the observer.

4. At no time have I ever received a complaint from defense counsel, from the physician retained by defense counsel or the insurance company to the effect the observer interfered, impeded, or in any way, directly or indirectly, restricted the activities of the physician during the CR 35 exam.

5. The only time I have been informed of displeasure or concern on the part of the examining physician has been when the examining physician did not know of or was misinformed regarding the right of the examinee to have an observer at the CR 35 examination and/or to have the observer audiotape it.

6. To the contrary, it has been my observance that the most effective defense CR 35 medical examiners are those who choose not to make an issue of the fact of the observer or the audiotaping.

7. It has been my experience that when the CR 35 examination is observed and audiotaped, that the defense medical examinations are more thorough, more courteous, and less stressful and/or traumatic for the examinees, my clients.

8. Further, never have I heard in conversation or in any professional publication in the state of Washington complaints or surmise to the effect that observers at CR 35 examinations impede, interfere, or otherwise restrict physicians conducting the CR 35 exam.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 25 day of May, 1999, at Seattle, Washington.

John Alexander

DECLARATION OF J. STEPHEN FUNK

J. Stephen Funk, being first duly sworn on oath deposes and says:

On at least two occasions I have attended my client's IME and the doctor indicated there was no problem. On numerous occasions my client has openly displayed a tape recorder and no doctor has ever said it interfered with the exam. A competent physician will simply ignore it.

I have been in law practice 36 years. In Washington the patient may at an independent medical exam have anyone he chooses accompany him and audiotape the exam.

The tape gives the patient confidence and precludes any possible argument about how the patient cooperated, whether he was abused or how long the exam took.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7 day of June, 1999 at Bellevue, Washington.

J. Stephen Funk

COUNCIL ON COURT PROCEDURES

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Telephone: (541) 346-3990
FAX: (541) 346-1564

January 26, 2000

To: Kathryn Clarke
Skip Durham
Ralph Spooner

Fm: Maury Holland MJH

Re: IME-Related Materials

Enclosed are some materials relating to IME's which Mike Marcus sent to me with a request that I forward a copy to each of you. Good luck with your efforts to solve all these problems.

EVERETT B. COULTER, JR. *
JOSEPH P. GAGLIARDI
MICHAEL C. GERAGHTY
M. JANE PARRY *
BRUCE E. COX

* ALSO ADMITTED IN IDAHO

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December 20, 1999

The Honorable Janice Wilson
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, OR 97204-1123

RE: Washington IME's

Dear Judge Wilson:

One Oregon Association of Defense Counsel circulated an e-mail regarding conduct of independent medical examinations in Washington.

I have been practicing for 25 years and most of my practice is defense work. I practice in Eastern Washington and North Idaho and probably have 20-30 IME's per year conducted.

In my experience, having a witness attend the IME, audio recording the IME or even video recording the IME is generally not justified. I have not kept any statistics on my practice, but I would estimate that less than 25% of the IME's that I request involve a witness, audio recording or video recording. It is generally an inexperienced lawyer who somehow has the perception that the IME is biased, slanted and inappropriate. Recently I had an experience with an attorney insisting that the IME be video taped, and I did review the video tape of the IME. The result of the video taping was that the examination took significantly longer than usual. I think a potential problem exists in audio taping or video taping the IME and then subsequently allowing the tape to be played to the trier of fact in that it becomes duplicative in terms of testimony.

I have had some concerns of audio and visual taping IME's in that many physicians are not willing to have the matter audio taped or video taped. In a particular case, audio means recorded the IME and the plaintiff kept crying out when the physician was applying feather touch to the effected area and the impression that one may have reached was that the doctor was hurting the patient.

In terms of video taping IME's, I think a very definite risk exists and that it is an intrusive process when an individual is garbed in a hospital gown and truly does not present all that well.

Am not certain what experience the Oregon courts have had with how the IME's are conducted, but in my opinion and experience, if a plaintiff does want to have someone along then a third party independent witness that observes the process is probably the best safe guard - assuming a safe guard is necessary. Recording, whether audio or video, is an effort to create a chilling atmosphere around doctors that would be willing to perform IME's. I have a very strong sense that some plaintiff's attorneys have sought to freeze out physicians from performing IME's.

Very truly yours,

EVERETT B. COULTER, JR.

EBC:jh

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Direct Dial: 503-499-4420

December 21, 1999

Hon. Janice R. Wilson
Circuit Court Judge
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, OR 97204

Re: Potential Change in Motion Panel Position on Independent Medical Exam

Dear Judge Wilson:

I understand from Judge Jones that the Motions Panel is considering a change to its position that a party subjected to an IME is not allowed to tape the IME or have a third party present. I have surveyed a number of Oregon Association of Defense Counsel members, including several who practice in Washington. I have also talked with a number of defense attorneys who practice in the state of Washington, which allows for taping and the presence of a third party.

The Oregon Association of Defense Counsel believes strongly that a change in the rule would interfere with the independent medical exam process, raise the cost of litigation and involve the court more frequently in discovery battles. First, we believe it will have a chilling effect on physicians willing to do independent medical exams. As you know aggressive litigation strategies have already caused some medical practitioners in Oregon to severely limit the number of independent medical exams they perform or stop performing this service altogether. We believe that allowing tape recording of such exams and in particular allowing a third party to attend would exacerbate this problem significantly.

Second, this will clearly increase the cost of litigation, as the party having the IME will either bring their counsel or another medical practitioner to the IME. This will add costs to every case.

Most importantly, we foresee any change in the rule as creating the opportunity for a myriad of discovery battles surrounding the extent and nature of third party participation in IMEs. This would unnecessarily take up the court's time to resolve these battles.

As to the Washington experience, the practice has evolved of involving the court in actual selection of the medical examiner. Representatives frequently interfere with the process

even though the rule prohibits such interference. They will object to certain questions, answer questions instead of allowing the examinee to answer, provide information focused on the legal process rather than the medical issues, and become argumentative with the medical practitioner. These issues are particularly important with psychiatric medical exams. The conditions must be ideal for such exams and the presence of a third party is a significant interference in this type of exam.

Other Washington lawyers report that there has not been any particular utility to result from the presence of a representative other than to attempt to interfere with the process during the IME.

In Washington there are a number of disputes, resetting of IMEs and delays involving what constitutes a proper representative. Parties have attempted to bring a variety of experts into the IME, including nurse practitioners, chiropractors, their treating physician, paralegals or their counsel. Recently one of my partners in our Washington office had Judge Ladley rule that it was improper to bring an expert to an IME.

If you would like some more specific examples of how the rule has been implemented in Washington and some of the problems that have been created, we would be happy to provide you with those details. We thank you very much for soliciting our input on this important matter. We would request that the Motion Panel consider having an open forum or roundtable discussion with a group of plaintiffs' and defense lawyers on this issue before a decision is made, if a change is under consideration. Thank you very much for your review of these matters.

Sincerely,

Chrys Martin

Chrys A. Martin

CAM:ejl
cc: OADC Board

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OREGON MEDICAL ASSOCIATION

December 17, 1999

The Honorable Robert P. Jones
1021 SW 4th
Portland, OR 97204

Dear Judge Jones,

Per our recent phone conversation here is the letter from OMA's outside counsel on the subject of IME recordation.

Happy holidays!

Sincerely,

Paul R. Frisch

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*Also Member of District of Columbia Bar
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RAYMOND F. MENSING, JR.
(1930-1999)

December 14, 1999

Mr. Paul Frisch
Oregon Medical Association
5210 SW Corbett Ave.
Portland, OR 97201

Re: Recording and Attorney's Presence at IME's

Dear Paul:

I enclose herewith a copy of the case of *Pemberton v. Bennett* in which the Oregon Supreme Court ruled that whether plaintiff was entitled to have her attorney present at an IME was left to the sound discretion of the trial court. The state of the existing law in Oregon is that if the plaintiff can convince the trial court that there is a legitimate need for a lawyer to be present, that can be accomplished with the proper showing to the trial court. If the plaintiff's lawyer is going to be allowed to be present, shouldn't the defendant's lawyer also be allowed to be present? If this is a female patient being examined, is this going to result in a lot of embarrassment to all parties concerned, and is it going to interfere with an effective evaluation by the physician?

I am less concerned about tape recording the IME as I am about the lawyer being present. I assume it would be the plaintiff's responsibility to do the recording.

I think some physicians will be unwilling to conduct IME's if lawyers are present. The existing rule has worked reasonably well throughout the years and I think it should be left as it is, with it remaining in the sound discretion of the trial court whether an attorney may be present or if it is to be recorded. I attach the State of Washington rule. Mick Hoffman, who does most of his practice in Washington, says it works okay.

The other issue that was raised was the matter of plaintiffs' lawyers subpoenaing physicians as fact witnesses and not following the guidelines of the OMA and the Oregon State Bar for payment of time loss. Unfortunately, these are only guidelines and always have been, and there is no way to enforce them. However, the plaintiff's lawyer takes the risk that he will get an

angry, hostile witness who may not be cooperate. Part of the problem, from the plaintiff's lawyer's standpoint is that the costs or the fees being charged by physicians nowadays are sometimes quite high and the case just doesn't justify spending that type of money.

If you wish to pass this on to Judge Jones, feel free to do so.

Sincerely,

Thomas E. Cooney

TEC/alw
Enclosures

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Argued April 4, affirmed May 15, 1963

PEMBERTON v. BENNETT ET AL

381 P. 2d 705

Personal injury action. From a judgment of the Circuit Court, Multnomah County, Virgil Langtry, J., the plaintiff appealed. The Supreme Court, Denecke, J., held that order calling for examination of the plaintiff out of the presence of the plaintiff's attorney by a doctor selected by the defendants was not an abuse of discretion.

Affirmed.

Damages—Medical examination—Presence of counsel

1. Determination in personal injury action of whether counsel may insist upon being present at a medical examination of his client by a physician other than the treating physician lies within discretion of trial court.

Damages—Medical examination out of presence of attorney

2. Order in personal injury action calling for examination of plaintiff out of the presence of the plaintiff's attorney by a doctor selected by the defendants was not an abuse of discretion.

Damages—Proof—Injuries—Result of prior accident

3. Proof in personal injury action that plaintiff's injuries were not caused by defendants' fault and were the result of a prior accident was properly adduced, under pleading denying that defendants' conduct had caused plaintiff's injuries, to establish that injuries were the result of a prior injury, and admission of such proof was not objectionable on theory that its admission, in absence of a mitigation pleading, represented an unpermitted effort to establish mitigation of damages.

Damages—Instruction—Aggravation of a prior injury

4. Trial court properly instructed jury in personal injury action concerning the law against recovery for an aggravation of a prior injury even though aggravation of a pre-existing injury had not been pleaded in view of fact that defendants had urged that the injuries for which damages were sought were caused by a prior accident and in view of medical testimony indicating a relationship between present physical condition and prior accident.

See right of party to have his attorney or physician present during his physical examination at instance of opposing party.
17 Am Jur, Discovery and Inspection (rev ed § 45).
64 ALR2d 497.
CJS Damages § 174.

Department 2.

Appeal from Circuit Court, Multnomah County.

VIRGIL LANGTRY, Judge.

Martin Schedler, Portland, argued the cause for appellant. On the briefs were Schedler & Moore, Portland.

Thomas E. Cooney, Portland, argued the cause for respondents. With him on the brief were Maguire, Shields, Morrison, Bailey & Kester, Portland.

Before MCALLISTER, Chief Justice, and PERRY, O'CONNELL, DENECKE and LUSK, Justices.

AFFIRMED.

DENECKE, J.

The defendants admitted liability and plaintiff recovered a verdict in a personal injury action in the sum of $1,731.55. Plaintiff alleges that she suffered serious injuries and in her complaint she prayed for $45,000 general damages and $1,231.55 special damages. Plaintiff has appealed from the verdict.

Plaintiff assigns as error the trial court's granting of defendants' motion to require plaintiff to be physically examined by a physician selected by the defendants out of the presence of plaintiff's attorney. Defendants' motion was accompanied by an affidavit. It recited that it had been arranged for plaintiff to be examined by a physician; that the plaintiff arrived with her attorney who refused to permit the plaintiff to be examined unless he was present; and that the physician refused to make the examination under these conditions. There is nothing to indicate in what way plaintiff believed her physical examination out of the presence of her attorney would be or was prejudicial

to her. The defendants did not offer any testimony at the trial and the physician who examined the plaintiff did not testify.

Other jurisdictions have varied in their solution to this problem; partially depending upon statutes of the jurisdiction and the particular circumstances attendant upon the examination. See Annotation, "Right of party to have his attorney or physician present during his physical examination at instance of opposing party," 64 ALR2d 497 (1959).

This court in *Carnine v. Tibbetts,* 158 Or 21, 74 P2d 974, held that the requirement of a physical examination by a physician selected by the opposing party is largely within the discretion of the trial court. In that case, however, it was held that the trial court abused its discretion by refusing to order a physical examination. The court there stated, at p 34:

> "The order requiring the litigant to submit to a physical examination should contain provision for reasonable safeguard against offending or injuring the party to be examined. If the plaintiff has any objection to being examined by the doctor suggested by the defendant, the court should designate some physician of competent skill, indifferent between the parties: * * *
>
> "Other matters which may arise relating to the examination should be provided for in the order appointing the physician. * * *"

The right of counsel to be present was not discussed.

1. We hold that whether or not counsel can insist on being present at a medical examination of his client by a physician other than the treating physician, is a matter largely within the discretion of the trial court.

The most compelling ground for conditioning the right to a physical examination upon the right of coun-

sel to be present is that when a person retains counsel to represent him in litigation, such counsel ordinarily can be present at all times to advise his client in any matter affecting the lawsuit. On the other hand, a medical examination is not an occasion when the assistance of counsel is normally necessary. This is so because of the nature of a medical examination, which is very different, for example, from an oral discovery examination by opposing counsel. It is also not ordinarily regarded as an adversary proceeding because a medical examiner is not supposed to be, and ordinarily is not, seeking to establish facts favorable to the party who engaged him to make the examination. This is the case even though the examining physician is selected and compensated by the opposing party.[1] Unfortunately, such objectivity is not always present.

The presence of an attorney in an examination would probably tend to prolong the examination and could create an atmosphere in which it would be difficult to determine the examinee's true reactions. This would result in it becoming more difficult to secure a medical examination by the kind of physician whose opinions are particularly desired by the court, i.e., those who regard the examination as an objective attempt to find the facts, regardless of the consequences to any party.

However, there are certain occasions when the trial court might determine that the attorney's presence at all or part of an examination is a reasonable request. The examinee, the examiner, the nature of the proposed examination or the nature of the medical problem,—these factors, separately or collectively, could cause the trial court to condition the examination upon the attorney being permitted to be present at all or part of the examination.

[1] Principles of Medical Ethics, American Medical Association, § 6: "A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care."

2. In the instant case, no reason was advanced why it was desirable or necessary that the attorney for the plaintiff be present at the examination. The trial court had no basis for determining whether or not the examination should be conducted with or without the presence of plaintiff's counsel. This assignment of error is found to be groundless.

3. The defendants attempted to prove at trial that the plaintiff's injuries were not caused by defendants' fault but had been caused by a prior accident. Plaintiff objected to such proof and now contends that its admission was error because such proof was a matter of mitigation of damages and mitigation had not been pleaded by the defendants. This is not a matter of mitigation of damages. Defendants were contending that the plaintiff's condition was not caused by the conduct of the defendants, but rather was caused by a prior accident. This is a contention that may be made under pleadings in which the defendants deny plaintiff's injuries were caused by defendants' conduct.

4. Plaintiff excepted to the court's instruction to the jury that the plaintiff could not recover for an aggravation of a pre-existing injury because the plaintiff had not pleaded aggravation. Plaintiff argues that aggravation was not in the case because she did not plead it and neither did defendants. As above stated, the defendants did urge that the injuries plaintiff was seeking damages for were caused by a prior accident. The physician called by the plaintiff testified that there was some relationship between plaintiff's pres-

ent physical condition and the prior accident. The trial court was justified in believing, under these circumstances, that an instruction that the plaintiff could not recover for an aggravation of a prior injury was necessary for the clarification of the jury.

Judgment affirmed.

Argued April 4, Affirmed May 15, 1963

MARTIN v. GOOD

381 P. 2d 713

Suit for rescission of exchange of motels. From an adverse judgment of the Circuit Court, Marion County, George A. Jones, J., the plaintiff appealed. The Supreme Court, Denecke, J., held that evidence was insufficient to establish that plaintiff, who was an experienced businessman and who had worked as an accountant for almost 10 years, was entitled to rescission on ground of inadequacy of consideration and misrepresentation of income from motel he received in the exchange.

Decree affirmed.

Exchange of property—Evidence insufficient

1. Evidence was insufficient to establish that plaintiff, who was an experienced businessman and who had worked as an accountant for almost 10 years, was entitled to rescission of exchange of motels with defendant on ground of inadequacy of consideration and misrepresentation of income from motel he received in the exchange.

Appeal and error—Equity—Opinion of trial judge

2. In equity cases, the facts are tried de novo by reviewing court, but in case involving contradictory testimony, opinion of trial judge who saw witnesses and had an opportunity to appraise the value of their testimony, is entitled to great weight.

Appeal and error—Decree in equity

3. Reviewing court will not reverse a decree in equity case by deciding one witness is to be believed and another witness is not to be believed unless because of peculiar circumstances reviewing court is convinced that trial court's decision in that regard is clearly erroneous.

Exchange of property—Evidence insufficient

4. Evidence was insufficient to establish that plaintiff, who claimed that he would not have exchanged motels with defendant if he had known that a person acting as agent for defendant had an interest in defendant's motel, was not informed by defendant of such agent's interest.

Principal and agent—Double agency

5. When there is a double agency, one principal cannot charge the other principal by reason of the agent's breach of his agency obligation unless such breach was at the instigation of the other principal.

ty. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; September 1, 1997.]

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the 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. The party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination. Unless otherwise ordered by the court, the party or the party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner.

(b) **Report of Examining Physician or Psychologist.**

(1) If requested by the party against whom an order is made under rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. 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 that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

[Amended effective July 1, 1972; September 17, 1993.]

RULE 36. REQUESTS FOR ADMISSION

(a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. Requests

TAIT & ASSOCIATES, P.C.

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December 29, 1999

The Honorable Janice R. Wilson
Circuit Court of the State of Oregon
Fourth Judicial District
Multnomah County Courthouse
1021 SW Fourth Avenue
Portland, OR 97204-1123

Re: Motion Panel Advisory Rulings Related to ORCP 44 Examinations

Dear Judge Wilson:

I am an insurance defense lawyer. I have been defending personal injury claims involving independent medical examinations since 1971. I am currently on the Board of Directors of the Oregon Association of Defense Counsel. My primary area of practice is Clackamas County but I have had numerous cases in other counties in Oregon.

First, in my nearly 30 years of personal injury practice this issue has only come up four or five times. I recently discussed this matter with my former partner, Fred Canning, who practiced personal injury litigation as a defense lawyer for 37 years. He does not recall the issue ever arising in his practice. In fact, I was unaware of the Multnomah County Circuit Court Civil Motions Panel ruling relating to defense medical examinations until just recently.

In my practice, the issue has typically come up when the plaintiff's attorney or someone from the plaintiff's office shows up without notice at the defense medical examination. I have experienced two very different reactions. In one situation, I recall the doctor simply got his own tape recorder to tape the matter so he could be sure that the record was accurate.

It is the other doctor's reaction that concerns me most. The doctor was extremely offended. He viewed the examination as a medical and not a legal event. He felt that his honesty and integrity were being impugned by the implicit suggestion that he could not nor would not conduct an appropriate examination and accurately report his findings. The doctor refused to do the defense medical examination.

I have seen a dispute between the plaintiff and the defense examining physician regarding what happened during the examination on perhaps two or three occasions in over 500 personal injury trials. In other words, a rule allowing recordings or attendance of a witness at defense medical examinations is simply not justified based upon my years of experience.

I hire doctors on a regular basis to perform what I view as independent medical examinations. My experience has been that the physicians I deal with are honest and conscientious. Their views oftentimes conflict with the views of treating physicians. The differences in medical opinions arise from different philosophies and usually reflect a general difference of opinion between practitioners. I have no interest in tape recording meetings between plaintiffs and their physicians nor do I want to attend such meetings. I may disagree with medical opinions but I almost never question the integrity of an opposing physician.

Part of the inherent problem with litigation is that injured people sometimes get confused about whether they are seeing a doctor for medical or legal reasons. Highlighting the legal aspect of a medical visit by recordings or witnesses will do little to advance the medical side of the case and has a potential for interfering with the medical process.

In summary, I believe that recordings or the presence of attorneys or representatives will do nothing to promote the ends of justice. I suspect that the vast majority of competent plaintiffs' attorneys if given the option to appear or not appear at an independent medical examination would choose not to appear.

Very truly yours,

James C. Tait
JCT:cmc

cc: Chrys Martin

MARCUS

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BOYD M. CHAMBERS
JAN 06 2000
JUDGE JANICE WILSON

January 5, 2000

Hon. Janice Wilson
Circuit Court Judge
Multnomah County Courthouse
1021 SW Fourth Avenue
Portland, OR 97204

Re: Proposed Rule Changes Regarding Medical Examinations

Dear Judge Wilson:

I have learned that you are the new chair of the Multnomah County Motion Panel that is now considering a rule change relating to defense medical examinations. Specifically, being considered, based only on what I have been told, is a rule that would permit the plaintiff and the plaintiff's attorney to somehow record (audio and/or video) the examination or have an observer present during the course of that examination.

Before any court rule is changed or new rule adopted, I urge your panel to take the steps necessary to determine if a problem that requires correction truly exists. Have there been abuses and, if so, who was involved (both sides) and what happened? There may have been abuses, but on the other hand, there may well be legitimate explanations for whatever happened. Listening to the anecdotal experiences from only one side of a controversy that has an interest in gaining an advantage will do no more than aggravate whatever problem actually exists.

There is an old adage that, if one is around long enough, things will begin to repeat themselves. I suspect that we are now there. During the mid-1970's, a similar issue arose out of a swell of alleged abuses of the independent medical examination process. Quite frankly, few of the alleged abuses were ever substantiated, but, nonetheless, the problem was addressed.

Re: Proposed Rule Changes Regarding Medical Examinations

From that controversy, a group of attorneys from the Multnomah County Bar Association and representatives of the medical community met together in an effort to resolve the problem. A companion issue related to the difficulty the plaintiff's attorneys were having in scheduling the testimony of treating physicians and the professional fees that they were charging. Out of this process, a policy was developed and it was at least customary that defense medical examinations would be attended only by the examining physician(s) and the plaintiff/patient and nothing would be recorded on behalf of a plaintiff. At the same time, something of a "truce" was reached with respect to the difficulties that had been experienced with physicians appearing as witnesses and how much they charge. It remained rather quiet for a long time.

It was during this same period of time that ORCP 44 was being developed with a fair amount of debate and analysis. That rule was adopted in 1978. It contemplates an order issued by the court specifying the time, place, manner, conditions and scope of the examination. This has largely been ignored because attorneys, at least for the most part, are able to work out the details without court intervention. The rule provides that, from the examination, the plaintiff is entitled to receive a medical report and no more. Surely, if it was intended that the plaintiff would be entitled to more than a medical report or would be entitled to have the plaintiff's attorney or some other observer present during the course of the examination, the Council on Court Procedures that developed the rule and the legislature that adopted it, would have so provided.

The discovery process incident to civil litigation has become notably more contentious with the passage of time. There are probably a lot of reasons for this, but, as it grows, we must recognize that any court rule that might be adopted must be balanced and fair.

The controversy seems to have its origin in personal injury claims arising out of auto accidents, slip and fall incidents and similar kinds of accidents. Invariably, it pits a treating physician or chiropractor appearing on behalf of the plaintiff against a physician retained on behalf of a defendant to address the injury claims made by the plaintiff. To an outsider, it probably seems clear that the physicians and/or chiropractors are advocates for those for

whom they appear and, because of this, balance and fairness to both sides is critical. Simply stated, a court rule should not create a potential for unfairness.

I now do little personal injury work where independent medical examinations are used. However, the majority of my work brings me into contact with many physicians of various specialties such that I have come to know their perception of the litigation process and their willingness to be involved.

I have found that most competent and skilled physicians are simply not willing to get involved in the litigation process in any capacity. Necessarily, that means that the number of physicians available and willing to do examinations and participate in the process, is very limited. Even their number has gone down rather dramatically of late and will continue to do so if the current trend continues. This could develop to the point where there are not enough qualified physicians to do this kind of work or the only physicians available are those who are not acceptable to either side. The balance needed for the litigation of personal injury cases will be at risk if participation means a transformation of the physician's clinic into an extension of the courtroom and the adversarial process.

The reasons that I perceive for what has occurred and likely will continue to occur in the future are as follows:

1) Most physicians view history-taking and the physical examination as a private process in a clinical setting. They believe strongly that the examination room should not be converted into something closely akin to a courtroom. They endeavor to keep the specter of litigation outside of the examination room and eliminate as much as possible the potential overlay and secondary gain influences.

   Those physicians with whom I have spoken strongly believe that if their examinations are somehow recorded or attended by litigation related observers, the clinical atmosphere will be destroyed. Further, under such circumstances, the validity of examination results will be highly suspect. Clearly, such an examination would be under significantly different circumstances than any examination conducted by the

treating physician which will likely never be subject to an audio or video tape recording or attended by a representative of the defendant. Again, balance is important.

The influence of litigation is probably inherent in this process no matter what is done. As an example, most competent physicians openly say that they will not undertake elective surgery related to litigation until the litigation is fully resolved. They have found that the need for surgery often disappears rather suddenly once the lawsuit is resolved. To add yet another layer of interference between the clinical atmosphere and the decision-making process from a medical standpoint will likely create even more imbalance and unfairness.

I have found that competent and skilled physicians who might be willing to conduct such examinations will not do so if the litigation process invades the examination room. The words used by those with whom I have spoken have been "staged", an "opportunity for a performance" and doing little more than creating yet another bit of evidence to conceivably be used by a plaintiff. If done in this fashion, they acknowledge that, if asked on cross examination about the relative validity of the examination findings, they would have to say that the findings have questionable validity. Plainly, this does not promote fairness.

2) There is a developing tactic by some plaintiff's attorneys to issue subpoenas duces tecum to physicians who do defense medical examinations to produce an extraordinary variety of income records and reports of medical examinations done in other cases that are totally irrelevant to the case in question. These efforts have been increasing, although they have met with mixed results before the courts that have been confronted with motions to quash and for protective orders. Competent and skilled physicians do not want and do not need this kind of intrusion and are unwilling to expend the effort that is required to respond to such subpoenas. They are simply not willing to transform their offices into litigation management centers where the expense far exceeds the revenue that could reasonably be generated.

Re: Proposed Rule Changes Regarding Medical Examinations

This is something rarely done with respect to the involvement of treating physicians even though they are involved in just as much litigation on behalf of their patients. Much like defense medical examiners, they, too, are paid for their time.

This situation has driven skilled and competent physicians away to such an extent that they are simply not willing to get involved. To add another layer of intrusion by recording their examinations or having representatives of the plaintiff observing the examination will drive even more away from the process. This is closely akin to the situation that existed during the mid-1970s when few physicians were willing to get involved in conducting medical examinations. I fear that we are destined for the same problems that then existed.

The risk of changing the current rule to allow audio and/or video tape recording of defense medical examinations or to allow observers is to deprive the defendants of having skilled and competent physicians conduct such examinations. This will produce imbalance and unfairness to the process. After all, no plaintiff's attorney would ever be willing to allow the history taking and physical examination of a treating physician to be somehow recorded on behalf of a defendant nor would they allow defense observers to sit in on such examinations. Defendants are no less entitled to an examination with some semblance of an impartial clinical setting than plaintiffs.

I am enclosing a copy of a motion and supporting points and authorities that we filed not long ago in a Clackamas County case to obtain an order for a defense medical examination. Also enclosed is the plaintiff's memorandum in opposition and a copy of the court's order. Between these documents, you will find there are citations to a sizeable amount of legal authority on the subject that may be helpful to you and your panel.

In my judgment, the rule should remain for purposes of defense medical examinations, that the plaintiff is not entitled to record the history or physical examination nor will an observer be present on behalf of the plaintiff. If a rule needs to be considered or adopted, I would suggest that

Re: Proposed Rule Changes Regarding Medical Examinations

consideration be given instead to whether subpoenas may be issued to physicians to produce voluminous examination and financial records regarding unrelated medical examinations.

I suspect that you will be receiving a fair amount of input addressing what may be a proposed rule change relating to defense medical examinations. Please consider what I have outlined above as a part of that process.

Very truly yours,

Larry A. Brisbee

Larry A. Brisbee
LAB:dm
Enclosures

cc Chrys Martin
Jonathan Hoffman

CHRYS A. MARTIN
E-mail: chrys.martin@bullivant.com
Direct Dial: 503-499-4420

MARCUS

Bullivant | Houser | Bailey

A Professional Corporation

January 6, 2000

Honorable Janice R. Wilson
Circuit Court Judge
Multnomah County Circuit Court
1021 SW Fourth Avenue
Portland, Oregon 97204

RE: Motion Panel - IMEs

Dear Judge Wilson:

Enclosed is a transcript from a recent ruling by a trial court judge in Clark County allowing a protective order preventing a treating practitioner from attending an IME. The discussion highlights the problems inherent in such a situation.

Sincerely,

Chrys A. Martin

CAM:cv/dm
Enclosure
cc: OADC Members (w/o enc)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

SHAFFER, DIEDRE,)

Plaintiff,)

v.) No. 96-2-0055-9

HOWINGTON, RICHARD, et ux,)

Defendants.)

VERBATIM REPORT OF PROCEEDINGS

BEFORE: HONORABLE JAMES D. LADLEY, Judge

APPEARANCES: Stanley F. Horak, Attorney for the Plaintiff

Douglas F. Foley, Attorney for the Defendants

April 2, 1999

THE COURT: Are you going to try a case on Monday, Mr. Foley?

MR. FOLEY: Before Judge Harris, Your Honor.

THE COURT: I thought you were.

MR. HORAK: Not this one. I hope not.

THE COURT: No. No.

MR. FOLEY: This is our motion, Your Honor. I think that for some reason our motion didn't get noted or filed. I did file it.

THE COURT: It is probably in the file, Counsel. And I would apologize because the only thing I saw was Mr. Horak's motion coming back and I didn't realize --

MR. HORAK: I have a copy of his motion if that helps the Court.

THE COURT: No, it's in here. It's Defense Motion for Protective Order.

MR. FOLEY: This is sort of a continuing discussion from our motion last time on trying to keep our limited pool of IME doctors intact. It's a problem for us. We have just a handful of people willing to come to court and take the slings and arrows. I respect Stan for trying and for what he's doing, but looking at the financial information, which he's entitled to do in a summary fashion, I am against that too. He sent me written deposition questions, and I will provide that to him. Will not give him tax returns and things of that

nature.

MR. HORAK: That's already been decided.

MR. FOLEY: What happened at the IME, she showed up with a chiropractor, which is the most unusual thing that I have had happen at an IME, and Dr. Peterson took extreme umbrage to that and I do too not just because he's a chiropractor but because I think it's outside the rule and also because it is an attempt conceivably to throw an expert witness into this case again. I thought he was a treating chiropractor. As it turns out, he's just a chiropractor that walked around in this lady's back pocket I guess for the purpose of this examination, and my doctor didn't want to do it. He thought that was improper, and as I think the Court may understand, being second guessed by a chiropractor coming at the whole injury syndrome from a different perspective would be I think totally improper. We don't send our IME doctors to their examinations of their doctors. The Court has control over the situation. I did not have time to do a long brief on this, but in the case of -- in the comments on physician examination you --

THE COURT: What are you looking at?

MR. FOLEY: It's the practice book, Orland and Tegland, Volume 4, page 223. It says that the patient who's -- psychiatric exam under CR 35. The claimant attorney can insist on being present but he's not entitled to have his

spouse or other family members present at the time. Under the comments to the rule in the pocket part it states, "Committee believed that an independent medical examination can be a stressful and intimidating experience for a party and thus that the person being examined should be able to have a representative present if for no other reason than for moral support. In addition, however, it's argued that such an examination may often result in ex parte discovery with the examiner asking a number of questions regarding the party's history. If only the answers and not the questions are recorded, it is difficult to tell if the examiner's report contains errors. An observer may be able to act as a secondary resource in this situation. But for this reason the proposed amendment also provides that either the party or the party's representative may make an audiotape recording of the examination, though such recording must not be allowed to interfere or obstruct the examination."

We have no objection to obviously an audio recording and somebody sitting as an observer. The problem with the chiropractor is that it's going beyond the witness level, and basically this is a witness ruling. In other words, you get to have somebody there to make a record of what happens, not to develop expert testimony for an additional layer of expert discovery or expert attack.

As the Court is fully also aware, and I've got

to make this as a public policy argument in addition to my argument based on the rule, is that as I said when I started out, I have a very limited pool of doctors who are willing to do that, and there's even a more limited pool of, quite frankly, qualified doctors who are articulate, who can explain their position to the jury, who may or may not have a certain belief system about medicine versus chiropractic, which I'm entitled to provide to the jury, and I don't believe that the purpose of the rule's fulfilled by allowing an expert to come along for the purpose of developing expert testimony as opposed to the witness representation, which is allowed by the rule, to simply make sure that there is a record suitable for the plaintiff's needs to say what did or didn't happen. And so to introduce another layer of expert intrusion into basically kind of an objective witness function and a moral support function is changing the nature of the game.

If my doctors will not allow -- they won't do these in front of chiropractors. I don't know how many other claimants' attorneys are in the room, maybe one or more. This immediately spreads like wildfire. Everyone knows everyone in this community, and it really depletes our ability to defend.

THE COURT: Mr. Horak.

MR. HORAK: Well, Your Honor, kind of amazing, the Tegland case that he cited predates the change in the rules. In fact, that's what the rule was based on, so that's not

really precedent in this case, and it did say a person had the right to have an observer present. If you look at the commentary that we have --

THE COURT: I'm reading it.

MR. HORAK: -- overreaching and inaccurate reporting is what they're looking for. That's the purpose of the rule. What Mr. Foley is saying and what Dr. Peterson has said is that all licensed chiropractors from the state of Washington, if you're licensed by the State of Washington to be a chiropractor that you have knowledge about what an examination is, what a history is, how to do an orthopedic test. You're barred from observing to see whether or not we did the test properly or not.

THE COURT: What Mr. Foley's talking about, Counsel, and I think there is equity on both sides of the argument, he's concerned now that Hagen -- isn't that your expert?

MR. FOLEY: Peterson.

MR. HORAK: Thomas Kelly was the person to observe.

THE COURT: Thomas Kelly is going to come in and when he talks -- if he's making an issue with the evaluation, he's going to do it as a chiropractor and he's going to do it as an expert. So then what you're doing is sending an expert to his IME. And what you're doing then is requiring him to have an expert on top of your expert to contradict your expert. Then you go right on out. But you are sending an

expert to the IME.

MR. HORAK: That's true. If I sent an orthopedic, he would object to an orthopedic doctor watching that orthopedic evaluation? Would he have the same basis then?

THE COURT: You're adding a whole layer of experts and again what you're doing of course, Mr. Horak, is just exactly what Mr. Foley is saying, and I know you don't care because --

MR. HORAK: I don't agree with what he's saying.

THE COURT: Well, of course. You're blunting his expert's desire to participate in these things.

MR. HORAK: No. Not at all. His expert can examine. He has to follow the Washington rules, and there are plenty of experts willing to follow the Washington rules. The purpose of having the observer there is for knowledge. What we're saying is he's not ~~interfering~~, he's not biased, he's not prejudiced.

THE COURT: He's sitting there as an expert. He's going to come over here and he's going to give opinions and he's going to be subject to the expert witness instruction, which is not -- he's just not a common person.

MR. HORAK: But he can tell whether the test was done properly. Whether he did the range of motion test properly. Whether he didn't do it properly. He did all of these tests. Better to have an observer that has no training

in medical skills at all?

THE COURT: When you're the treating physician, treating your client, is his expert entitled to be there to say that Dr. Bell did the range of motion test properly?

MR. HORAK: His expert already gives that opinion in trial: looking at the medical records, these tests were not proper.

THE COURT: That's the point.

MR. HORAK: That's what his expert already does.

THE COURT: That's the point. That's the point. They're doing it on the basis of the record. They're not there investigating. Well, Counsel, it's just a gut call on this thing. I don't think there's a right or a wrong but I would agree with you, Mr. Foley, on this. I think to send an expert over to participate in the examination is outside the scope and intent of the rule.

MR. FOLEY: I'll submit an order. Thank you, Your Honor.

THE COURT: That's the way I'm going to rule on it. And this may be something that the appellate court's going to have to take up, Counsel, because we know, I know, you know because you gentlemen are in it, that the discovery process is taking over and is becoming more important than the claim itself and then the trial itself. And it's a question of who has an edge. And that's what's driving these things and

that's what I think this is. This is intimidation, and I'm not blaming you, Stan. But that's what I think it is and I don't think it's what the rule intended. So I'll grant your motion, Counsel.

MR. FOLEY: Thank you, Your Honor.

MR. HORAK: Thank you.

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CERTIFIED A TRUE TRANSCRIPT James A. Frame

James A. Frame, Official Reporter

James A. Frame, RPR
FR-AM-EJ-601LZ9

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

RANDALL L. RYERSE and DIANE K. RYERSE, Plaintiffs, v. GEORGE A. HADDOCK and ROBERT KEECH ASSOCIATES, INC., an Oregon Corporation, Defendants.	No. 98-04-401 DEFENDANT KEECH'S MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF (ORCP 44A) Oral Argument Requested Expected Length: 15 Minutes

UTCR CERTIFICATION

The undersigned certifies that a good faith effort was made to confer with plaintiff regarding the issues in dispute. Oral argument is requested. Court reporting is not requested. It is estimated that 15 minutes will be required for oral argument.

MOTION

Defendant Robert Keech Associates, Inc. ("Keech") moves pursuant to ORCP 44A for an order requiring plaintiff Randall L.

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/erse to submit to a physical examination by Curt Kaesche, M.D., on April 28, 1999, at the hour of 12:45 p.m., at 1505 Division St., Oregon City, Oregon. The scope of the examination is to make a physical examination of plaintiff for the purpose of evaluating the injuries which plaintiff alleges arose from the motor vehicle accident which is the subject of this lawsuit. Defendant Keech further seeks provisions in the order that plaintiff shall not be accompanied by any person (including his attorney) in the examination room, and shall not make an audio or video tape recording of the examination. This motion is based on ORCP 44A and the subjoined memorandum of points and authorities.

Dated this 8th day of April, 1999.

Barbara L. Johnston, OSB# 91478
Of Attorneys for Defendant Keech

Trial Attorney:
Larry A. Brisbee, OSB# 67011

POINTS AND AUTHORITIES

1. **Background.**

Plaintiff's attorney has indicated by letter that he will agree to a physical examination of the plaintiff, but only if "a witness" is allowed to accompany plaintiff into the examination room and to make a tape recording or videotape of the examination. Defendant submits that such procedures would be highly inappropriate. This motion seeks an order pursuant to ORCP 44A for the examination, including explicit conditions that no one be

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llowed to accompany plaintiff into the examination room, and that no tape recording of the examination be allowed.

This is a lawsuit about an ordinary motor vehicle accident. There is nothing unusual about plaintiff's alleged injuries, and no suggestion has been made that defendant Keech will retain a biased or incompetent examiner. Yet plaintiff seeks the extraordinary measure of having a witness present in the examination room, and of memorializing the examination through tape recording or videotape.

2. Oregon law favors a medical examination unhampered by conditions such as plaintiff proposes.

ORCP 44 was adapted in 1978 from various sources, including FRCP 35. Prior to the adoption of ORCP 44, the Oregon Supreme Court decided the case of *Pemberton v. Bennett*, 234 Or 285, 288, 91 P2d 705 (1963), which addressed the question of whether counsel had a right to be present during a defense medical examination. The court held that it was a matter of discretion for the trial court, but that "a medical examination is not an occasion when the assistance of counsel is normally necessary." Even though the examiner was selected by defendant, the examiner was guided by medical ethics which required the examiner not to be influenced in such a way that the examiner's medical judgment and skill would be impaired. 234 Or at 288, n.1. There have been no final Oregon state decisions construing ORCP 44A or B since its adoption.[1]

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[1] *Tri-Met, Inc. v. Albrecht*, 308 Or 185, 777 P2d 959 (1989) construed ORS 656.325(1) to allow an observer at a workers compensation medical examination. This is distinguishable, however, both because the Supreme Court said it was not to be decided under ORCP 44, and because workers compensation benefits

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ever, there is at least one indication of how a number of Oregon judges feel about the issue: the Motions Panel Rulings adopted by the Multnomah County Circuit Court Motions Panel.[2] Section 2(a) provides in relevant part:

> "A. Defense Medical Examinations (ORCP 44)
>
> "1. Presence of Counsel -- Plaintiff's counsel may not attend a defense medical examination.
>
> "2. Recording -- An examination may not be recorded or memorialized in any fashion other than the report required under ORCP 44B."

The foregoing consensus statements do not have the force of law, and certainly not in Clackamas County. But they do "represent the consensus of the Panel's members and are intended to provide

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are denied to claimants who obstruct an independent medical examination. Thus the presence or absence of such obstruction is an issue to be determined by the fact-finder. *See* discussion in *Romano v. II Morrow, Inc.*, 173 FRD 271, 274 (D.Or. 1997). Notably, the Supreme Court in *Tri-Met* did not disagree with the Court of Appeals' interpretation of ORCP 44 in a civil litigation context, *Tri-Met, Inc. v. Albrecht*, 95 Or App 155, 157-158, 768 P2d 421 (1989):

> "[T]he presence of an attorney at a medical examination is not favored. It could tend to prolong the examination and create other than a neutral setting for what is supposed to be an objective evaluation. * * * [T]he presence of an attorney at an independent medical examination ... would only serve to threaten the objective environment and ... could lead to obstruction of the examination." (citations omitted).

[2]The Multnomah County Motions Panel is a group of duly elected Circuit Court judges who regularly hear civil motions. They have reviewed, evaluated and reached a consensus on legal issues frequently raised by motion. A copy of their June 1998 rulings is attached hereto as Exhibit A.

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lidance to the Bar."

There is another problem with plaintiff's insistence on observing and recording the medical examination which has been addressed by Oregon law: it will operate to deprive defendant of its choice of physician examiners. Dr. Kaesche, defendant Keech's choice of examining physician, will refuse to conduct an examination under plaintiff's conditions. See accompanying affidavit of Larry A. Brisbee, and attached letter from Dr. Kaesche's office. Under Oregon law a defendant is presumptively entitled to choose the physician conducting the examination of the plaintiff and a claim of bias is not sufficient to defeat that choice. *Bridges v. Webb*, 253 Or 455, 457, 455 P2d 599 (1969). Cases from other jurisdictions have held that a plaintiff's claim of bias or prejudice is not sufficient to defeat that choice. *Douponce v. Drake, supra*, 183 FRD at 566; *Looney v. National Railroad Passenger Corp.*, 142 FRD 264 (D. Mass. 1992); *Timpte v. District Court*, 161 Colo. 309, 421 P2d 728 (1966). The Oregon court points out that defendant's choice of examiners should be honored, absent a valid objection, in the interests of "providing both parties with an equal opportunity to establish the truth." *Id.* A defendant is entitled to have plaintiff examined by a doctor "in whom defendant has confidence and with whom he can consult." *Id.*

As indicated in the affidavit of Larry A. Brisbee, Dr. Kaesche is a well-respected expert in orthopedics, and his office is in Oregon City, the location where the trial will be held. Mr.

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isbee indicates he is aware of other cases in which judges of this court have refused to require a plaintiff to appear for a defense medical examinations at a location remote from Clackamas County, even where the defendant has offered to pay all of the plaintiff's costs in connection with the examination. Indeed, remoteness of proposed examining physician is perhaps the only reason why a defendant's choice of physician has been rejected. *See, Looney, supra,* 142 FRD at 265-266. A remote examination, even were it allowed, also implicates significantly greater costs and witness scheduling difficulties in connection with the physician's appearance at trial, should that be required.

If this court allows plaintiff's conditions to be attached to the medical examination, then defendant will need to find another physician, someone who is not defendant's first choice. In addition, the time before trial is short (although a motion for a postponement has been filed herein), and there may be difficulties scheduling another appointment a meaningful time before trial.

3. Decisions under similar federal rule do not allow conditions such as plaintiff proposes.

ORCP 44A, relating to the order for the examination, and ORCP 44B, relating to the report, a copy of which is to be provided to the examined party, are almost word-for-word derived from FRCP 35. Accordingly, decisions construing the similar federal rule are important and persuasive. Almost uniformly, such decisions have prohibited the plaintiff's counsel from being present during the examination, have prohibited the presence of any other person, and

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ve prohibited the tape recording (whether audio or video) of the examination, all absent unusual or compelling circumstances. A variety of reasons have been advanced for these holdings.

a. **Non-attorney observers not allowed because of tendency to interject adversarial atmosphere.**

For example, in *Romano v. II Morrow, Inc.*, 173 FRD 271, 274 (D.Or. 1997), the plaintiffs in a repetitive stress injury case wanted to have a non-attorney observer present during their physical examinations. The court (Frye, J.) noted that an observer, court reporter or recording device would constitute a distraction during the examination and would work to diminish the accuracy of the process. The presence of an observer would also "interject an adversarial partisan atmosphere into what should be otherwise a wholly objective inquiry." *Id.*, quoting from *Shirsat v. Mutual Pharm. Co.*, 169 FRD 68 (ED Pa. 1996). The court noted that the plaintiffs were not children, and had been examined by doctors many times in the past. There was no basis for their claim that they needed "reassurance" during the examination process. *Id.*

b. **Attorney observers also not allowed.**

Romano involved a proposal that a non-attorney observer be present during plaintiff's medical examination by defendant's expert. But there are even more compelling reasons for an attorney not to be present. (Plaintiff's counsel has not stated that he wishes to be present, but the phrase "a witness" is vague enough to encompass that possibility). If there is any matter during the examination which the plaintiff wants to contest, the attorney is

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cessarily a witness to such matter. Of course DR 5-102 prohibits a lawyer from acting as an advocate at trial if the lawyer is likely to be a witness. *Wheat v. Biesecker*, 125 FRD 479 (N.D. Ind. 1989).

Additionally, a lawyer is even more likely to create an adversarial or partisan atmosphere in an examination than would a non-lawyer observer. In *Wood v. Chicago M., St. Paul & Pacific R. Co.*, 353 NW2d 195, 197 (Minn. App. 1984) (construing Minn.R.Civ.P. 35.01, patterned after FRCP 35), the court noted:

> "To require routinely that attorneys be present during adverse medical examinations is to thrust the adversary process itself into the physician's examining room. The most competent and honorable physicians in the community would predictably be the most sensitive to such adversarial intrusions. The more partisan physicians might feel challenged to outwit the attorney. Thus, we fear that petitioner's suggested remedy would only institutionalize the abuse, convert adverse medical examiners into advocates, and shift the forum of controversy from the courtroom to the physician's examination room."

Before the advent of the Federal Rules of Civil Procedure, it was generally held that an attorney could be present during a physical examination. But if there was a rule or statute authorizing examinations and setting conditions for them, and the rule or statute did not provide for the presence of the attorney, the result was generally to forbid the attorney's presence. *Dziwanoski v. Ocean Carriers Corporation*, 26 FRD 595, 597 (D.Md. 1960). What was accomplished by those predecessor rules and statutes, and then by FRCP 35 was to

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> "lessen the danger of fraud by enabling the defendant to prepare himself properly for trial. It places a defendant on an equal footing as nearly as may be with a plaintiff, so far as concerns the opportunity to discover the true nature and extent of injury suffered."

(quoting *Bowing v. Delaware Rayon Co.*, 8 W.W. Harr. 206, 38 Del. 206, 190 A. 567, 569).

c. **Observers undermine the goal of putting defendants on an equal footing.**

The necessity to put defendants on an equal footing with plaintiff with regard to knowledge about the plaintiff's alleged injuries, is an important function of ORCP 44. The plaintiff's condition is, after all, something uniquely within the knowledge of the plaintiff. Neither defendants and their counsel, nor "a witness" on their behalf, are allowed to be present when the plaintiff is examined by the plaintiff's own physician or other expert. No tape recordings of such examinations are available to the defendants. Yet the plaintiff's physical condition is central to the claim being litigated. *See generally, Bridges v. Webb*, 253 Or 455, 457, 455 P2d 599 (1969) (endorsing the policy of putting both parties on an equal footing through defendant's choice of medical examiner.)

See also, Tomlin v. Holecek, 150 FRD 628, 632 (D. Minn. 1993), in which the court said that one of the central purposes of Rule 35 is "to provide a 'level playing field' between the parties in their respective efforts to appraise" the plaintiff's condition. To that end the party requesting the examination should be free from

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oversight by the opposing party. As the court noted:

> "To the extent that the Plaintiff regards [the examination by defendant's examiner] as providing an unacceptable degree of license with which she [the examiner] may question him at will, that degree of latitude is no greater than the liberality extended to the Plaintiff's consultants, who are expected to testify in this matter on the same general subject matter as may be expected from [defendant's examiner]."

d. **Plaintiff has other options to challenge the credentials of the examiner, or outcome of the exam.**

If plaintiff feels that Dr. Kaesche is biased, that the examination was inappropriate in some way, or that the wrong conclusion was reached, there are a number of avenues open to plaintiff to point that matter out to the court or to the jury. Evidence rules govern the admissibility of the report. Motions in limine are available to challenge the admissibility of the report, or parts of the report, prior to trial. Plaintiff will have his own expert witnesses to challenge any conclusions of Dr. Kaesche with which plaintiff may disagree. Plaintiff will have the opportunity to cross-examine Dr. Kaesche if defendant calls him as its witness. A number of different cases have pointed out the various methods available to plaintiff to challenge the findings of an FRCP 35 examination, *see, e.g., Dziwanoski* at 598 (plaintiff's counsel may time the examination, ask his client questions about the exam, cross examine the doctor, and inspect the report); *Warrick v. Brode*, 46 FRD 427, 428 (D. Del. 1969) (right to cross examine); *Wood*, supra, at 197 (right to receive report, cross-examine and introduce contrary expert testimony); *Holland v. U.S.*,

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182 FRD 493, 495-496 (D.S.C. 1998) (right to cross-examine, right for plaintiff to privately consult with plaintiff's own examiners) and *Douponce v. Drake*, 183 FRD 565 (D. Colo. 1998) (bias more appropriately a matter for cross examination at trial).

e. Videotaping or recording the examination should not be allowed.

Plaintiff here proposes that the examination be tape recorded or videotaped, in addition to having "a witness" present. Such a procedure would present an additional obstacle to defendant's right to examine plaintiff in a way designed to elicit the most frank and accurate results. As the court said in *Holland, supra*, 182 FRD at 496,

> "[T]he presence of a videographer could influence Mr. Holland [the plaintiff], even unconsciously, to exaggerate or diminish his reactions to Dr. Westerkam's [the physician's] physical examination. Mr. Holland could perceive the videotape as critical to his case and fail to respond in a forthright manner. In addition, the videotape would give Plaintiffs an evidentiary tool unavailable to Defendant, who has not been privy to physical examinations made of Mr. Holland by either his treating physicians or any experts he may have retained. Such a result undermines the purpose of Rule 35."

Accord, Douponce, supra, at 567; *Shirsat, supra*, at 70.

4. Lack of expert discovery in Oregon provides an additional reason why an examination should be ordered free of plaintiff's proposed conditions.

Under Oregon law there is an even more compelling reason why defendants should be afforded medical examinations without any interference or monitoring by plaintiff: there is no discovery of

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expert witnesses. At least under the federal rules, a defendant does have some access to plaintiff's expert witnesses, by interrogatory and deposition, to find out what they know about plaintiff's condition, what types of examinations and tests were conducted, and what conclusions the experts reached. But in Oregon, by contrast, none of that information is available to a defendant.

In Oregon, a defendant is not allowed to make inquiry of plaintiff's treating physician, because of the physician-patient privilege which is not ordinarily waived until the time of trial. *State ex rel Grimm v. Ashmanskas*, 298 Or 206, 213, 690 P2d 1063 (1984). No inquiry whatsoever can be made of any of plaintiff's other experts because of Oregon's rule prohibiting discovery of expert witnesses. *Stotler v. MTD Prods., Inc.*, 149 Or App 405, 943 P2d 220 (1997). Although the plaintiff himself may be deposed, he does not have the medical knowledge to provide any significant medical information about his condition, what examinations and tests were conducted, or the thought process by which his physicians reached their conclusions. In order to afford a defendant the fullest opportunity to evaluate plaintiff's alleged injuries, the examining physician must be given an unhampered opportunity to conduct a complete examination, without interference from witnesses or videographers. This examination is a defendant's only opportunity to independently evaluate what, medically, is actually wrong with the plaintiff.

/ / /

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CONCLUSION

The decisions summarized above uniformly hold that under FRCP 35 and similar rules, such as ORCP 44, derived from FRCP 35, it is not appropriate to allow another person to accompany the plaintiff into a medical examination, nor to allow the recording of the examination by videotape, tape recorder or otherwise. The only exceptions are for highly unusual circumstances. This is an ordinary motor vehicle accident case, involving alleged injuries that are not highly controversial. There is no reason to depart from the usual rule.

There is good cause for the proposed examination. Plaintiff's damages are the primary matter in controversy, liability having already been determined. Defendants have no way to evaluate plaintiff's injuries first hand, except through the medical examination opportunity offered by ORCP 44.

Defendant Keech respectfully requests the court to grant the motion for a physical examination of plaintiff at the time and place set forth in the motion, and that plaintiff be prohibited

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from bringing his attorney or any other individual into the examination room, and from tape recording or videotaping the examination.

Dated this 8th day of April, 1999.

Barbara L. Johnston, OSB# 91478
Of Attorneys for Defendant Keech

Trial Attorney:
Larry A. Brisbee, OSB# 67011

April 8, 1999
I:\WP51\BLJ\KEECH\ORCP44.MOT

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MOTIONS PANEL RULINGS

The Motions Panel of the Multnomah County Circuit Court has reviewed all prior Panel rulings to determine if ruling should continue in effect and has adopted some new rulings. All current Panel rulings are set out below. Any [redacted]uling not set out below is no longer in effect.. These rulings represent the consensus of the Panel's members [redacted]ided to provide guidance to the Bar. However, these rulings do not have the force of law and may be rted from by any judge in any case.

RBITRATION

. Amendment of Pleadings - Amendment of pleadings subsequent to an appeal from an arbitration award is rally not allowed.

. Motions - Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator. UTCR 0(3). A party may show cause (by application to the Presiding Court) why a motion should not be decided by the rator.

. Punitive Damages - Where the actual damages alleged are less than $25,000 (or for cases filed after Feb. 1, 1996, 00), the pleading of a punitive damages claim which may be in excess of the arbitration amount does not exempt a from mandatory arbitration.

ISCOVERY

.. Defense Medical Examinations (ORCP 44)

1. Presence of Counsel - Plaintiff's counsel may not attend a defense medical examination.

2. Recording - An examination may not be recorded or memorialized in any fashion other than the report ired under ORCP 44B.

3. Vocational Rehabilitation Exams - Vocational rehabilitation exams will not be authorized unless they are ormed as part of an ORCP 44 examination by a physician or a psychologist.

Depositions

1. Attendance of Experts - Attendance of an expert at a deposition will generally be allowed, but will be ewed on a case-by-case basis upon motion of a party.

2. Attendance of Others - Persons other than the parties and their lawyers may attend a deposition, but a [redacted]pply to the court for the exclusion of witnesses.

3. Out-of-State Parties - A non-resident plaintiff is normally required to appear at plaintiff's expense in on for deposition. Upon a showing of undue burden or expense, the court may order, among other things, that ntiff's deposition occur by telephone with a follow-up personal appearance deposition in Oregon before trial.

A non-resident defendant is normally not required to appear in Oregon for deposition at their own expense. The osition of a non-resident corporate defendant, through its agents or officers, shall normally occur in the forum of the oration's principal place of business. However, the court may order that a defendant travel to Oregon at either y's expense, to avoid undue burden and expense and depending upon such circumstances as whether the alleged luct of the defendant occurred in Oregon, whether defendant was an Oregon resident at the time the claim arose, and ther defendant voluntarily left Oregon after the claim arose.

4. Videotaping - Videotaping of discovery depositions is allowed with the requisite notice. The notice must gnate the form of the official record. There is no prohibiiton against the use of BOTH a stenographer and a video, ng as the above requirements are met.

5. Speaking Objections - The motion panel has recommended that the Multnomah County Deposition delines be amended to state that "attorneys should not state anything more than the legal grounds for the objections reserve the record, and objection should be made without comment".

. Experts

1. Discovery - Discovery under ORCP 36B(1) generally does not extend to the identity of non-medical experts.

. Insurance Claims Files - An insurance claim file "prepared in anticipation of litigation" is protected by the work luct doctrine regardless of whether a party has retained counsel. Upon a showing of hardship and need pursuant to P 36B(3) by a moving party, the court will inspect the file in camera and allow discovery only to the extent ssary to offset the hardship (i.e., not for production of entire file).

. Medical Chart Notes

1. Current Injury - Medical records, including chart notes and reports, are generally discoverable in personal [redacted]s. These are in addition to reports from a treating physician under ORCP 44. The party who requests an [redacted]port will be required to pay the reasonable charges of the practitioner for preparing the report.

2. Other/Prior Injuries - ORCP 44C authorizes discovery of prior medical records "of any examinations relating juries for which recovery is sought." Generally, records relating to the "same body part or area" will be overable, and the court needs to be satisfied that the records sought actually relate to the presently claimed

EXHIBIT A

Privileges

1. Psychotherapist-Patient - ORCP 44C authorizes discovery of prior medical records of any examinations ıg to injuries for which recovery is sought. Generally, records relating to the same or related body part or area [redacted] erable. In claims for emotional distress, past treatment for mental conditions is generally discoverable. [redacted]504(4) (b) (A).

Tax Returns - In a case involving a wage loss claim, discovery of those portions of tax returns showing an earning y, i.e., W-2 forms, is appropriate, but not hose parts of the return showing investment data or non-wage nation.

Witnesses

1. Identity - The court will require production of documents, including those prepared in anticipation of tion, reflecting the names, addresses and prepared in anticipation of litigation, reflecting the names, addresses hone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, neys are encouraged to provide a "list" of occurrence witnesses, including their addresses and phone numbers.

2. Statements - Witness statements, if taken by a claims adjuster or otherwise in anticipation of litigation, are ct to the work product doctrine. Generally, witness statements taken within 24 hours of an accident, if there is an ility to obtain a substantially similar statement, are discoverable.

ORCP 36B(3) specifies that any person, whether a party or not, may obtain his or her previous statement erning the action or its subject matter.

Surveillance Tapes - Surveillance tapes of a plaintiff taken by defendant are generally protected by the work-luct privilege, and not subject to production under a hardship or need argument.

VENUE

. Change of Venue (forum non convenes) - Generally, the court will not allow a motion to change venue within the ounty area (from Multnomah to Clackamas or Washington counties) on the grounds of forum non convenes.

. Change of Venue - FELA - The state court will generally follow the federal guidelines regarding choice of venue ELA cases.

MOTION PRACTICE

[redacted] Faith Conferences (UTCR 5.010) - Last minute phone messages or FAX transmissions immediately before ng of a motion do not satisfy the requirements of a good faith effort to confer.

3. Copy of Complaint - The failure to attach a marked copy of the complaint to a Rule 21 motion pursuant to UTCR 0(2) may result in denial of the motions. UTCR 1.090.

2. Praecipe Requirement - Failure to properly praecipe a motion pursuant to SLR 5.015 may result in denial of the tion(s). UTCR 1.020.

DAMAGES

A. Non-economic Cap - The court will not strike the pleading of non-economic damages over $500,000 on authority of S 18.560.

REQUESTING PUNITIVE DAMAGES

A. All motions to amend to assert a claim for punitive damages are governed by ORS 18.535, ORCP 23A, UTCR apter 5 and Multnomah County SLR Chapter 5. Such motions also will be governed by summary judgment procedures ORCP 47 and related case law except where inconsistent with the statute and rules cited in the first sentence. largements of time are governed by ORS 18.535(4), ORCP 15D and UTCR 1.100.

B. A party may not include a claim for punitive damages in its pleading without court approval. A party may lude in its pleading a notice of intent to move to amend to claim punitive damages. While discovery of a party's lity to pay an award of punitive damages is not allowed until a motion to amend is granted per ORS 18.535(5), the rties may conduct discovery on other factual issues relating to the claims for punitive damages once the opposing rty has been put on written notice of an intent to move to amend to claim punitive damages.

C. All evidence submitted must be admissible per ORS 18.535(3); evidence not objected to will be received. Testimony nerally must be presented through deposition or affidavit; live testimony will not be permitted at the hearing absent traordinary circumstances and prior court order.

D. If the motion is denied, the claimant may file a subsequent motion based on a different factual record (i.e. ditional or different facts) without the second motion being deemed one for reconsideration prohibited by Multnomah [redacted] R 5.045.

[redacted] For cases in mandatory arbitration, the arbitrator will decide any motion to amend to claim punitive damages. e arbitrator's decision may be reconsidered by a judge as part of de novo review under UTCR 13.040(3) and 13.100(1).

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

RANDALL L. RYERSE and DIANE K. RYERSE, Plaintiffs, v. GEORGE A. HADDOCK and ROBERT KEECH ASSOCIATES, INC., an Oregon Corporation, Defendants.	No. 98-04-401 **AFFIDAVIT OF LARRY A. BRISBEE**

STATE OF OREGON)
) ss
County of Washington)

I, Larry A. Brisbee, being first duly sworn on oath, depose and say:

I am the trial attorney for defendant Robert Keech & Associates, Inc. (for the damage phase). I make this affidavit in support of defendant Keech's motion for physical examination of plaintiff pursuant to ORCP 44A.

BRISBEE & STOCKTON
Attorneys at Law
139 N.E. Lincoln Street, P.O. Box 567
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Telephone (503) 648-6677

In preparation for trial, I have requested a physical examination of plaintiff's claimed injuries. Plaintiff's counsel indicated that he would agree to the examination, but only if plaintiff could take along a witness, and only if the examination could be videotaped. I am unwilling to agree to those conditions.

On behalf of defendant Keech, my choice of a physician to examine plaintiff is W. Curt Kaesche, M.D., both because he is a highly regarded orthopedist, and also because his office is in Oregon City, which will be convenient for the plaintiff and for the trial of this matter. I am aware of other Clackamas County cases in which judges have refused to require plaintiffs to be examined by physicians remote from Clackamas County, so that is another basis for my choice of Dr. Kaesche. I have had my assistant schedule an appointment for plaintiff's examination by Dr. Kaesche on April 28, 1999 at 12:45 p.m.

I have learned that Dr. Kaesche will object to plaintiff's conditions, and in fact will refuse to perform an examination under those conditions. Attached hereto as Exhibit 1 is a letter which I have received by fax from Fred Flaherty, administrator for Oregon Orthopedic & Sports Medicine Clinic, the group with which Dr. Kaesche practices. I would have requested written confirmation from Dr. Kaesche himself, but as the letter indicates, he is out of the country until April 26, 1999.

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I request that the court grant our motion for an examination ... the indicated date, free of the conditions which plaintiff seeks to have imposed.

Larry A. Brisbee

SUBSCRIBED AND SWORN to before me this ___ day of April, 1999.

Notary Public for Oregon

April 8, 1999
I:\WP51\BLJ\KEECH\LAB.AFF

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OREGON ORTHOPEDIC & SPORTS MEDICINE CLINIC, LLP

POST OFFICE BOX 519 • Oregon City • OR, 97045-0519

Physicians and Surgeons

W. Curt Kaesche, MD, PC
Jonathan H. Hoppert, MD, PC
Thomas P. McWeeney, MD, PC
Terrence A. Sedgewick, MD, PC
Marc R. Davidson, MD
David A. Buuck, MD

April 8, 1999

Larry Brisbee
P.O. Box 567
Hillsboro, OR 97123

Re: Ryerse V Haddock
Clackamas County No. 98 04 401

Dear Mr. Brisbee

Dr. Kaesche is out of the country until April 26, 1999 and can not be contacted at this time. He is scheduled for an IME April 28, 1999 with Mr. Ryerse.

It is Dr Kaesche's policy that the presence of a third party witness or attorney, voice or video taping is not allowed during the exam.

Thank you
Sincerely,

Fred Flaherty
Administrator

EXHIBIT 1
PAGE 1

Oregon City Office: 1505 Division St. • Oregon City, OR 97045 • Tel: (503) 656-0836 • Fax: (503) 656-9464
Tualatin Office: 19250 SW 65th, Suite 100 • Tualatin, OR 97062 • Tel: (503) 692-0366 • Fax: (503) 691-6167
Canby Office: 1185 S. Elm (Canby Clinic) • Canby, OR 97013 • Tel: (503) 656-0836 • Fax: (503) 266-6649
Milwaukie Office: 10202 SE 32nd Ave., Ste. 707 • Milwaukie, OR 97222 • Tel: (503) 652-1399 • Fax: (503) 652-1711

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT KEECH'S MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF (ORCP 44A)** on the following parties:

Michael P. Opton
Attorney at Law
621 S. W. Morrison Street, Suite 1440
Portland, Oregon 97205

Attorney for Plaintiff

James P. Dwyer
Attorney at Law
1220 S. W. Morrison, Suite 820
Portland, Oregon 97205

Attorney for Haddock as Plaintiff

Joseph W. Much
Attorney at Law
530 Center Street NE
Salem, Oregon 97301

Attorney for Haddock as Defendant

by mailing a true and correct copy thereof to said parties on the date stated below.

DATED April 8, 1999.

Barbara L. Johnston, OSB# 91478
Of Attorneys for Defendant Keech

BRISBEE & STOCKTON
Attorneys at Law
139 N.E. Lincoln Street, P.O. Box 567
Hillsboro, Oregon 97123
Telephone (503) 648-6677

Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

RANDALL L. RYERSE Plaintiff, v. GEORGE A. HADDOCK and ROBERT KEECH ASSOCIATES, INC., an Oregon corporation, Defendants.	Case No. 98-04-401 **PLAINTIFF'S RESPONSE TO DEFENDANT KEECH'S MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF**

Plaintiff Randall Ryerse, by and through his attorney Michael P. Opton and Opton, Galton & Underwood, hereby responds to defendant Keech's Motion for Physical Examination of Plaintiff (ORCP 44A).

INTRODUCTION

A defense medical examination is an adversarial proceeding where a physician of defendant's choosing is permitted to examine and interrogate a plaintiff. The defendant's physician routinely questions the plaintiff on his past medical history, current condition, and the events surrounding the injury with one purpose in mind: to elicit evidence that will reduce or eliminate the amount defendant must pay plaintiff for his injuries. The defendant's physician then prepares a DME report, after an unknown number of drafts, that presents the examination findings in a light most favorable to defendant. The defendant's physician often excludes any elicited responses from the plaintiff that would support plaintiff's case. The report prepared by defendant's physician is routinely used by the defendant both in settlement negotiations and at trial.

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Without Court-ordered safeguards permitting plaintiff's attorney's to attend and allowing plaintiff to audiotape record the exam, defendant's physician is free to prepare a report excluding information which would support plaintiff's case and defendant's physician is free to recite the information in a biased manner.

SUMMARY

(1) The Court should permit plaintiff Ryerse's legal counsel to attend the defendant's medical examination.

(2) The Court should permit plaintiff Ryerse to audiotape record the defendant's medical examination.

POINTS & AUTHORITIES

I. FACTUAL BACKGROUND.

Plaintiff Randall Ryerse filed the above-captioned action seeking recovery from defendant George A. Haddock and defendant Robert Keech Associates, Inc., for injuries he sustained in a motor vehicle accident occurring on September 4, 1997. Defendant Keech has moved the Court pursuant to ORCP 44A for an order requiring plaintiff Ryerse to submit to a physical examination by Curt Kaesche, M.D., a physician selected by defendant Keech. Defendant Keech has further moved the Court for an order forbidding plaintiff's attorney to accompany plaintiff in the examination room and forbidding plaintiff from audiotape recording the examination. Plaintiff Ryerse does not oppose a medical examination. Plaintiff does, however, request the Court permit plaintiff's legal counsel to accompany the plaintiff in the examination room and permit plaintiff to audiotape record the examination.

(II) ARGUMENT.

(a) Trial Court Determines Conditions For a Defendant's Medical Exam.

ORCP 44A provides in pertinent part that:

> " . . . the Court may order the party to submit to a physical or mental examination . . . The order may be made only on motion for good cause shown and upon notice of the person to

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be examined and to all parties **and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons to whom it is made."** [Emphasis Added]

Under ORCP 44A, the Trial Court decides the conditions under which a medical exam takes place. *Tri-Met, Inc. v. Albrecht*, 308 Or 185, 190, footnote 2, 777 P2d 959 (1989). The plaintiff's right to counsel at a medical examination is a matter within the discretion of the Trial Court. *Pemberton v. Bennett*, 234 Or 285, 287, 381 P2d 705 (1963). It is clearly within the Trial Court's discretion to allow plaintiff's legal counsel to accompany plaintiff to the DME and to permit plaintiff to audiotape record the examination.

(b) This DME Will Be an Adversarial Proceeding.

Defendant Keech asserts that defendant's physician is an expert witness and, therefore, the exam should not be monitored.

Defendant Keech is wrong in three respects. First, under ORCP 36, 39 and 43, an expert hired by a defendant may not participate in the questioning of a plaintiff, and may not examine plaintiff's property outside of the presence of plaintiff's counsel. Further, all depositions of opposing parties must be recorded by stenographic or other means.

Compelling a human being to subject himself to a physical or mental examination is one of the most invasive acts a Court can order. A party who is required to submit to this intrusion should be given at least the same protection we afford a machine or a parcel of real estate.

A more significant reason why monitoring is appropriate here is because the defendant, by labeling this doctor as its expert, has revealed its attitude about the physician selected. The defendant hired this doctor with the specific intent to assist defendants in the preparation and defense of plaintiff's damages claim, not as the Court and legislature envisioned, as an independent evaluator of plaintiff's conditions. The defendants, by claiming this doctor is their expert and by seeking expert privilege, have admitted that this physical exam will be an adversarial proceeding. As such,

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the plaintiff is entitled to all of the discovery safeguards and protections normally associated with any adversarial proceeding, namely rights to counsel and to a recorded record of the proceeding.

Finally, defendant Keech's assertion is incorrect because the Oregon Courts have held an ORCP 44A physician is not a party's expert. See *Nielsen v. Brown*, 232 Or 426, 431-444, 374 P2d 896 (1962) (Holding DME physician not entitled to expert witness protection and privilege.)

(c) The Court Should Permit Plaintiff Rverse's Legal Counsel to Attend the Defendant's Medical Examination.

(1) Statutory and case law supports allowing plaintiff's counsel to attend defendant's medical examination.

Defendant Keech asserts that judge's disfavor permitting an attorney to accompany his client to a defendant's medical examination. Oregon Courts, however, favor an attorney's presence at a defendant's medical exam when the examinee, the examiner, the nature of the exam or of the medical problem indicate it is desirable or necessary for counsel to be present. *Pemberton*, 234 Or at 288-289.

Here, defendant Keech has selected a physician with a long history of conducting medical exams for defense counsel and testifying on behalf of defendants. Defendant admits in his motion that he selected a physician "in whom defendant has confidence and with whom he can consult." See defendant Keech's Motion, page 5, lines 21-22. Defendant further admits that he viewed the physician as his own expert. Defendant Keech intends for this examination to be a second opportunity to depose plaintiff and to gather evidence to refute plaintiff's damages claims at trial. The nature of this exam will be an adversarial proceeding, and, as such, plaintiff should not be denied representation by legal counsel.

In *Tri-Met, Inc.*, the Oregon Supreme Court upheld a referee's decision that a worker's compensation claimant is entitled to legal representation at a DME. *Tri-Met, Inc.*, 308 Or at 190. The Court specifically rejected the appeals court reasoning that the presence of an attorney at the exam might affect the neutral setting or objective environment. *Tri-Met, Inc.*, 308

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Or at 188. The *Tri-Met* Court specifically held that there was not merit to the employer's assertion that a counsel's mere presence at a DME would taint the exam. *Id.* at 190. The rules providing for medical exams for worker's compensation claimants and for civil plaintiffs are similar. *See* ORS 656.325 and ORCP 44A. As such, a civil plaintiff should be afforded the same right to counsel as a worker's compensation claimant.

Many states recognize that an exam conducted by a physician who is hired by an adverse party is an adversarial proceeding and, therefore, provide that the person examined has the right to the presence of counsel. See *Langfeldt-Haaland v. Saupe Enterprises*, 768 P2d 1144 (Alaska 1989) (Examinee's lawyer may attend); *Munoz v. Superior Court of Santa Clara County*, 26 Cal. App.3d 643, 102 Cal. Rptr. 686 (1st Dist. 1972); *Brompton v. Poy-Wing*, 704 So.2d 1127 (Fla 4 DCA 1998) (Attorney generally may attend); *Broyles v. Reilly*, 695 So.2d 832 (Fla 2d DCA 1997); Michigan Court Rule 2.311 (Order for exam may allow plaintiff's counsel to attend); *Reardon v. Port Authority*, 132 Misc.2d 212, 503 N.Y.S.2d 233 (1986) (Attorney may attend mental exam); Okla Stat. tit. 12 Section 3235(D); *McCullough v. Mathews*, 918 P2d 25 (Okla. 1995) (Representative may be person's attorney); WA Court Rule 35(a) (Allows presence of attorney); *Tietjen v. Department of Labor & Industries*, 313 Wash. App. 86. 534 P2d 151 (1975) (Attorney may attend physical and mental exam).

Statutory and case law in Oregon and other jurisdictions support the plaintiff's position that counsel should be permitted to attend defendant's medical examination.

(2) Counsel's Presence Will Not Disrupt the Defendant's Medical Exam.

Defendant Keech claims that the presence of plaintiff's counsel will disrupt the plaintiff's medical examination. The Court in *Tri-Met*, however, found the assertion that the presence of an attorney at a DME would taint an exam "is patently absurd and only bolsters concerns over examiner objectivity." *Tri-Met, Inc.*, 308 Or at 190. The *Tri-Met* Court held that a party objecting to a counsel's presence must show "obstruction in fact". *Tri-Met, Inc.*, 308 Or at 190.

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Concern that an attorney's presence may hinder an examination is not sufficient reason to leave a plaintiff unprotected. *Scharff v. Superior Court*, 44 Cal. 508 282 P2d 896 (1955) (Holding that conditioning a plaintiff's right to proceed with her case on attending a DME unaccompanied by counsel imposed an unwarranted condition on her right to proceed to trial). Other states have rejected defendant Keech's argument that the presence of plaintiff's counsel will interfere with an exam.

Defendant Keech attempts to show obstruction because defendant's physician will not conduct the medical exam if the Court permits plaintiff's counsel to be present. The *Tri-Met* Court, however, specifically stated that a physician's objection to counsel's presence is not obstruction of the examination. *Id.* at 189. Further, defendant's choice of physician is not an absolute right. Defendant is only entitled to have plaintiff examined by a doctor of defendant's choice in the absence of a valid objection. *Bridges v. Webb*, 253 Or 455, 458. 455 P2d 599 (1969). The *Bridges* Court specifically delineated that the manner, scope or conditions of a proposed exam can be the basis of substantial objections. *Bridges*, 253 Or at 456-457.

Here, plaintiff has detailed how the proposed exam will be an adversarial proceeding because of the physician's history of conducting exams on behalf of defendants and because defendant Keech has admitted that he views defendant's physician as his expert witness. As the plaintiff has provided evidence of substantial objections to this physician, the plaintiff is entitled to the presence of counsel at the examination.

(c) <u>The Court Should Permit Plaintiff Rverse to Audiotape Record the Defendant's Medical Examination.</u>

Defendant Keech objects to plaintiff's audiotape recording of defendant's medical examination. The defendant's medical examination should be audiotaped to ensure the accuracy of the DME report. Defendant's physician will, as part of the exam, ask plaintiff a variety of questions concerning the plaintiff's medical history, plaintiff's injuries, and perhaps even details of the events surrounding plaintiff's injury.

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ORCP 39 provides for the recording of deposition testimony. If plaintiff is denied the opportunity to record the exam, the only record of the exam is the written report prepared by defendant's examining physician. The defendant's statement that he intends to use this physician as defendant's expert is an admission that this is an adversarial proceeding. It is within the discretion of the Trial Court to decide the conditions under which a medical exam is to take place. *Tri-Met, Inc.*, 308 Or at 190. The Court should provide safeguards that ensure the accuracy of the defendant's medical examination report.

Several states currently allow audio, video, or stenographic recording of exams. *See* Arizona R. Civ. P. 35(a); Calif. Code of Civil Procedure §2032(g); *Jacob v. Chaplin*, 639 N.E.2d 1010 (Ind. 1994); WA Court Rule 35(a) (audiotape recording); Arizona R. Civ. P. 35 (videotape recording upon showing of good cause); *Broyles v. Reilly*, 695 So.2d 832 (Fla. 2nd DCA 1997) (videotape recording permitted); Calif. Code of Civil Procedure, §2032(g) (stenographic recording of exams permitted).

III. CONCLUSION.

For the foregoing reasons, defendant Keech's Motion for Physical Examination should be denied.

DATED this 16TH day of April, 1999.

OPTON, GALTON & UNDERWOOD

Michael P. Opton, OSB #72187
Michael L. Gangle, OSB #97266
Of Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANT KEECH'S MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF on the attorneys of record, to-wit:

Joe W. Much
Spooner, Much & Ammann
Equitable Center Bldg., Suite 722
530 Center St. NE
Salem, OR 97301-3740

Larry Brisbee
Brisbee & Stockton
139 NE Lincoln St.
P.O. Box 567
Hillsboro, OR 97123

on Friday, April 16, 1999 by mailing to said attorneys a true copy thereof, certified by me as such, contained in a sealed envelope, with postage prepaid, addressed to said attorneys at their last known addresses as noted above, and deposited in the post office at Portland, Oregon on said day.

OPTON, GALTON & UNDERWOOD

Michael P. Opton, OSB #72187
Michael L. Gangle, OSB #97266
Of Attorneys for Randall Ryerse

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

RANDALL L. RYERSE and DIANE K. RYERSE, Plaintiffs, v. GEORGE A. HADDOCK and ROBERT KEECH ASSOCIATES, INC., an Oregon Corporation, Defendants.	)	No. 98-04-401 ORDER

This matter came on regularly before the court and undersigned judge on April 19, 1999, upon the motion of the defendant Robert Keech Associates, Inc. for an order pursuant to ORCP 44 directing the plaintiff, Randall Ryerse, to submit to a medical examination by Curt Kaesche, M.D., at his offices on May 6, 1999, at 7:45 a.m. and for a further order that no attorney or other person on behalf of the plaintiffs shall be in attendance during the medical examination and the medical examination shall not be recorded by audiotape or videotape by or on behalf of the plaintiffs. The plaintiff appeared by and through Michael L. Gangle, of their attorneys. The defendant, Robert Keech Associates, Inc., appeared

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by and through Larry A. Brisbee, of its attorneys. The defendant George A. Haddock appeared by and through Joe Much, of his attorneys.

The Court considered the legal authorities submitted on behalf of the parties and the arguments of counsel and thereupon concluded that the motion of the defendant Robert Keech Associates, Inc., was well taken and should be allowed in each particular.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

(1) In accordance with ORCP 44, the plaintiff, Randall Ryerse, shall appear at the offices of Curt Kaesche, M.D., on May 6, 1999, at 7:45 a.m. and, thereafter, undergo the medical examination scheduled for that time and place.

(2) No person other than the plaintiff and the medical personnel associated with the offices of Dr. Kaesche shall be present for purposes of the medical examination.

(3) The medical examination shall not be recorded by audiotape or videotape by or on behalf of the plaintiff.

(4) Upon completion of the medical examination, a medical report shall be prepared by Dr. Kaesche and a copy provided to the plaintiff's attorney.

DATED this ____ day of April, 1999.

Robert R. Selander
Circuit Judge

Prepared by:

Larry A. Brisbee, OSB #67011

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MARCUS

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

JANICE R. WILSON
JUDGE

PHONE (503) 248-3069
FAX (503) 248-3425

M E M O R A N D U M

To: Motion Panel Judges
From: Janice R. Wilson JRW
Date: January 18, 2000
Subject: ORCP 44 Exams – Input from OTLA

Attached is a letter form Tom D'Amore concerning ORCP 44 exams. There are several letters. affidavits and declarations attached. The declaration of Mr. Fulton was missing the referenced exhibits. I've asked Mr. D'Amore to send those to me and I'll circulate them as soon as I receive them.

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: D'Amore
. Brown
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Ashworth,
nsel

January 13, 2000

Honorable Janice R. Wilson
Circuit Court of the State of Oregon
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, OR 97204

RE: Input from OTLA related to ORCP 44 Examinations

Dear Judge Wilson:

OTLA President Linda Eyerman asked that I respond and provide information in response to your letter regarding ORCP 44 examinations, dated December 16, 1999, to Ms. Eyerman and OADC President Chrys Martin. Ms. Eyerman will respond under separate cover.

I am a member of the OTLA Board of Governors and serve as chair of the Motor Vehicles Section of OTLA. I am also licensed to practice in Washington and California; thus, I am somewhat familiar with the defense medical examination (DME) procedures in those states. I enclose copies of the applicable Washington statute (CR 35) and applicable California statute (CCP 2032(g)). The Motion Panel advisory rulings are at odds with procedures in these states.

In order to better understand how DMEs are conducted in other states, OTLA requested written comments from former Washington Superior Court Judge John N. Skimas and Washington practitioners. [Please see enclosed.] As you may know, Judge Skimas is now performing alternative dispute resolution in Oregon and Washington. We selected Washington because of its close proximity and because many of the DME doctors in Multnomah County also perform DMEs for Washington cases and under Washington law. Because of the high number of DME doctors in Portland compared to Vancouver, it is common to use Portland DME doctors for Clark County, Washington cases. We have found that the same DME doctors will allow recording and the presence of a representative for cases filed in Washington (as they are expressly required to do by CR 35), but they will not allow the same procedural safeguards for cases filed in Multnomah County.

Speaking for myself, I believe the published Motion Panel advisory rulings are <u>not</u> appropriate. I am not familiar with many instances in the civil or criminal law where a

party is denied basic procedural safeguards such as the presence of counsel and/or a record of a proceeding. In many motor vehicle cases, the sole or primary issue is the extent of injury. The DME physician is typically the primary witness to test the plaintiff's injury and credibility. In these cases, DME physicians (and medical review corporations) sometimes require examinees to fill out forms or make diagrams of their injury or pain as part of a DME. They may ask questions about property damage, impact speeds, and even liability. Putting aside the issue of whether these actions are a proper part of a medical examination, how is an attorney expected to provide effective representation without a record of the questions asked and answers given?

For the above reasons, a change in the Motion Panel advisory rulings regarding the presence of counsel and recording defense medical examinations would be appreciated. I believe the Washington and California rules would provide good models for the Motion Panel to review.

If you have any questions regarding the above, please do not hesitate to contact me.

Very truly yours,

D'Amore & Associates, P.C.

Thomas D'Amore

Enclosures
cc: Linda Eyerman

*1999 Superior Court Civil Rules. CR 35

WEST'S WASHINGTON LOCAL RULES OF COURT AND WEST'S WASHINGTON COURT RULES
PART IV. RULES FOR SUPERIOR COURT
SUPERIOR COURT CIVIL RULES (CR)
5. DEPOSITIONS AND DISCOVERY (Rules 26-37)

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the 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. The party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination. Unless otherwise ordered by the court, the party or the party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. 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 that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

*2000 (2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

[Amended effective July 1, 1972; September 17, 1993.]

California Code of Civil Procedure section 2032

2032. (a) Any party may obtain discovery, subject to the restrictions set forth in Section 2019, by neans of a physical or mental examination of (1) a party to the action, (2) an agent of any party, or (3) a natural person in the custody or under the legal control of a party, in any action in which the mental or physical condition (including the blood group) of that party or other person is in controversy in the action. (b) A physical examination conducted under this section shall be performed only by a licensed physician or other appropriate licensed health care practitioner. A mental examination conducted under this section shall be performed only by a licensed physician, or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders. Nothing in this section affects tests under the Uniform Act on Blood Tests to Determine Paternity (Chapter 2 (commencing with Section 7550) of Part 2 of Division 12 of the Family Code). (c) (1) As used in this subdivision, plaintiff includes a cross-complainant, and defendant includes a cross-defendant. (2) In any case in which a plaintiff is seeking recovery for personal injuries, any defendant may demand one physical examination of the plaintiff, provided the examination does not include any diagnostic test or **procedure** that is painful, protracted, or intrusive, and is conducted at a location within 75 miles of the residence of the examinee. A defendant may make this demand without leave of court after that defendant has been served or has appeared in the action, whichever occurs first. This demand shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the physician who will perform the examination. (3) A physical examination demanded under this subdivision shall be scheduled for a date that is at least 30 days after service of the demand for it unless on motion of the party demanding the examination the court has shortened this time. (4) The defendant shall serve a copy of the demand for this physical xamination on the plaintiff and on all other parties who have appeared in the action. (5) The plaintiff to whom this demand for a physical examination has been directed shall respond to the demand by a written statement that the examinee will comply with the demand as stated, will comply with the demand as specifically modified by the plaintiff, or will refuse, for reasons specified in the response, to submit to the demanded physical examination. Within 20 days after service of the demand the plaintiff to whom the demand is directed shall serve the original of the response to it on the defendant making the demand, and a copy of the response on all other parties who have appeared in the action, unless on motion of the defendant making the demand the court has shortened the time for response, or unless on motion of the plaintiff to whom the demand has been directed, the court has extended the time for response. (6) If a plaintiff to whom this demand for a physical examination has been directed fails to serve a timely response to it, that plaintiff waives any objection to the demand. However, the court, on motion, may relieve that plaintiff from this waiver on its determination that (A) the plaintiff has subsequently served a response that is in substantial compliance with paragraph (5), and (B) the plaintiff's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect. The defendant may move for an order compelling response and compliance with a demand for a physical examination. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel response and compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a plaintiff then fails to obey the order compelling response and

compliance, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction the court may impose a monetary sanction under Section 2023. (7) If a defendant who has demanded a physical examination under this subdivision, on receipt of the plaintiff's response to that demand, deems that any modification of the demand, or any refusal to submit to the physical examination is unwarranted, that defendant may move for an order compelling compliance with the demand. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (8) The demand for a physical examination and the response to it shall not be filed with the court. The defendant shall retain both the original of the demand, with the original proof of service affixed to it, and the original response until six months after final disposition of the action. At that time, the original may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period. (d) If any party desires to obtain discovery by a physical examination other than that described in subdivision (c), or by a mental examination, the party shall obtain leave of court. The motion for the examination shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination. The motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt to arrange for the examination by an agreement under subdivision (e). Notice of the motion shall be served on the person to be examined and on all parties who have appeared in the action. The court shall grant a motion for a physical or mental examination only for good cause shown. If a party stipulates that (1) no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed, and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages, a mental examination of a person for whose personal injuries a recovery is being sought shall not be ordered except on a showing of exceptional circumstances. The order granting a physical or mental examination shall specify the person or persons who may perform the examination, and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination. If the place of the examination is more than 75 miles from the residence of the person to be examined, the order to submit to it shall be (1) made only on the court's determination that there is good cause for the travel involved, and (2) conditioned on the advancement by the moving party of the reasonable expenses and costs to the examinee for travel to the place of examination. (e) In lieu of the procedures and restrictions specified in subdivisions (c) and (d), any physical or mental examination may be arranged by, and carried out under, a written agreement of the parties. (f) If a party required by subdivision (c), (d), or (e) to submit to a physical or mental examination fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may, on motion of the party, impose a monetary sanction under Section 2023. If a party required by subdivision (c), (d), or (e) to produce another for a physical or mental examination fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including

the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023, unless the party failing to comply demonstrates an inability to produce that person for examination. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023. (g) **(1) The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audiotape any words spoken to or by the examinee during any phase of the examination. This observer may monitor the examination, but shall not participate in or disrupt it. If an attorney's representative is to serve as the observer, the representative shall be authorized to so act by a writing subscribed by the attorney which identifies the representative. If in the judgment of the observer the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend it to enable the party being examined or producing the examinee to make a motion for a protective order. If the observer begins to participate in or disrupt the examination, the person conducting the physical examination may suspend the examination to enable the party at whose instance it is being conducted to move for a protective order. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If the examinee submits or authorizes access to X-rays of any area of his or her body for inspection by the examining physician, no additional X-rays of that area may be taken by the examining physician except with consent of the examinee or on order of the court for good cause shown. (2) The examiner and examinee shall have the right to record a mental examination on audio tape. However, nothing in this article shall be construed to alter, amend, or affect existing case law with respect to the presence of the attorney for the examinee or other persons during the examination by agreement or court order.** (h) If a party submits to, or produces another for, a physical or mental examination in compliance with a demand under subdivision (c), an order of court under subdivision (d), or an agreement under subdivision (e), that party has the option of making a written demand that the party at whose instance the examination was made deliver to the demanding party (1) a copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner, and (2) a copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner. If this option is exercised, a copy of these reports shall be delivered within 30 days after service of the demand, or within 15 days of trial, whichever is earlier. The protection for work product under Section 2018 is waived, both for the examiner's writings and reports and to the taking of the examiner's testimony. If the party at whose instance the examination was made fails to make a timely delivery of the reports demanded, the demanding party may move for an order compelling their delivery. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey an order compelling delivery of demanded medical reports, the court may make those orders that are just, including the

imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to those sanctions, the court may impose a monetary sanction under Section 2023. The court shall exclude at trial the testimony of any examiner whose report has not been provided by a party. (i) By demanding and obtaining a report of a physical or mental examination under subdivision (h), or by taking the deposition of the examiner, other than under subdivision (i) of Section 2034, the party who submitted to, or produced another for, a physical or mental examination waives in the pending action, and in any other action involving the same controversy, any privilege, as well as any protection for work product under Section 2018, that the party or other examinee may have regarding reports and writings as well as the testimony of every other physician, psychologist, or licensed health care practitioner who has examined or may thereafter examine the party or other examinee in respect of the same physical or mental condition. (j) A party receiving a demand for a report under subdivision (h) is entitled at the time of compliance to receive in exchange a copy of any existing written report of any examination of the same condition by any other physician, psychologist, or licensed health care practitioner. In addition, that party is entitled to receive promptly any later report of any previous or subsequent examination of the same condition, by any physician, psychologist, or licensed health care practitioner. If a party who has demanded and received delivery of medical reports under subdivision (h) fails to deliver existing or later reports of previous or subsequent examinations, a party who has complied with subdivision (h) may move for an order compelling delivery of medical reports. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey an order compelling delivery of medical reports, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to the sanction, the court may impose a monetary sanction under Section 2023. The court shall exclude at trial the testimony of any health care practitioner whose report has not been provided by a party ordered to do so by the court. (k) Nothing in this section shall require the disclosure of the identity of an expert consulted by an attorney in order to make the certification required in an action for professional negligence under Sections 411.30 and 411.35.

JOHN N. SKIMAS P.C.
Superior Court Judge, Ret.
201 N.E. Park Plaza Drive, Suite 210
Vancouver, WA 98684-5808
(360) 944-7205

October 27, 1999

Thomas D'Amore
Attorney at Law
506 SW Sixth Avenue, Suite 700
Portland, Oregon 97204-1527

Re: OTLA DME Task Force

Dear Mr. D'Amore:

Enclosed is a declaration which I hope will be of assistance to you and your task force in discussing the desirability of amending ORCP 44. If I may be of further assistance, please do not hesitate to give me a call.

Very truly yours,

John N. Skimas

DECLARATION OF JOHN N. SKIMAS

I, John N. Skimas, declare as follows:

From 1971 through 1992 I served as a Superior Court Judge in Vancouver, Clark County, Washington. During my tenure I had been requested on several occasions to authorize attendance at a CR 35 medical examination by a representative of claimants. Without express authority under the rule such a request was granted only on a showing of special circumstances. Occasionally a family member was permitted to attend instead of a representative mainly for moral support. The practice of granting these requests lacked uniformity and varied among judges. Hearings on these matters took valuable court time and increased the costs to the parties.

CR 35(a) was amended in 1993 to allow for the presence of a claimant's representative at a requested medical examination and for recording. Since 1992 I have participated in over 600 mediation/arbitration proceedings in Oregon and Washington cases where defense medical examinations were frequently involved. Some of the Washington cases had representatives present during medical examinations and I cannot recall any issue ever having been raised regarding attendance by a claimant's representative. I have also discussed the matter with two of my former colleagues and they have not experienced any claims of abuse or problems with the operation of the current rule other than a rare complaint by a doctor who does not understand or appreciate the purpose of the rule.

I certify under the penalty of perjury under the law of the State of Washington that the foregoing is true and correct.

Dated this 27th day of October, 1999.

John N. Skimas

DECLARATION OF JOHN ALEXANDER REGARDING OBSERVERS AT CIVIL RULE 35 MEDICAL EXAMINATIONS

John Alexander, declares as follows:

1. My name is John Alexander. I am an attorney licensed in the state of Washington. I am also licensed in the state of California and have been practicing in Washington state since 1978. The statements made by me are based upon my personal knowledge and I am competent to testify to the same in a court of law.

2. For the past 14 years I have practiced personal injury law exclusively. The vast majority of my experience has been as a plaintiff's personal injury lawyer; however, I have also been retained by insurance companies to represent defendants.

3. For the past six years, it has been my practice to send an observer to attend the physical examinations of my clients pursuant to the provisions of Civil Rule 35. For the past six months, it has become my practice to make certain that the full proceedings of the medical examination in the presence of my client be tape recorded by the observer.

4. At no time have I ever received a complaint from defense counsel, from the physician retained by defense counsel or the insurance company to the effect the observer interfered, impeded, or in any way, directly or indirectly, restricted the activities of the physician during the CR 35 exam.

5. The only time I have been informed of displeasure or concern on the part of the examining physician has been when the examining physician did not know of or was misinformed regarding the right of the examinee to have an observer at the CR 35 examination and/or to have the observer audiotape it.

6. To the contrary, it has been my observance that the most effective defense CR 35 medical examiners are those who choose not to make an issue of the fact of the observer or the audiotaping.

7. It has been my experience that when the CR 35 examination is observed and audiotaped, that the defense medical examinations are more thorough, more courteous, and less stressful and/or traumatic for the examinees, my clients.

8. Further, never have I heard in conversation or in any professional publication in the state of Washington complaints or surmise to the effect that observers at CR 35 examinations impede, interfere, or otherwise restrict physicians conducting the CR 35 exam.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 25 day of May, 1999, at Seattle, Washington.

John Alexander

DECLARATION OF J. STEPHEN FUNK

J. Stephen Funk, being first duly sworn on oath deposes and says:

On at least two occasions I have attended my client's IME and the doctor indicated there was no problem. On numerous occasions my client has openly displayed a tape recorder and no doctor has ever said it interfered with the exam. A competent physician will simply ignore it.

I have been in law practice 36 years. In Washington the patient may at an independent medical exam have anyone he chooses accompany him and audiotape the exam.

The tape gives the patient confidence and precludes any possible argument about how the patient cooperated, whether he was abused or how long the exam took.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7 day of June, 1999 at Bellevue, Washington.

J. Stephen Funk

OTLA
Oregon Trial Lawyers Association
In the Service of Justice

January 19, 2000

RCVD IN CHAMBERS
JAN 21 2000
JUDGE JANICE WILSON

The Honorable Janice R. Wilson
Circuit Court of the State of Oregon
Fourth Judicial District
Multnomah County Courthouse
1021 S,W. Fourth Avenue
Portland, Oregon 97204-1123

Re: Input on Motion Panel Advisory Rulings related to ORCP 44 Examinations

Dear Judge Wilson:

Thank you for inviting comment from OTLA and its members regarding the Multnomah County Motions Panel advisory rulings on defense medical examinations. These rulings have long been a concern for civil plaintiffs and their attorneys, and we welcome the opportunity to provide information which might lead to a withdrawal of these rulings and/or new rulings which interpret ORCP 44 as providing procedural safeguards for our clients.

The Need for Procedural Safeguards

It is hoped that the court will acknowledge the reality of defense medical examinations (DMEs), which are an integral part of the adversary process. As such, the procedural safeguards available to litigants during DMEs should be the same as those available during other parts of the adversary process. This may not have always been the case, but DME practice has evolved over the years. It has now become common practice for a plaintiff to be sent to an examiner whose primary job is medical consulting for insurance and litigation purposes. Even where the examiner is also a treating practitioner, the examiner is not a court-approved "neutral" but, rather, has been selected and paid for by the defendant. In all cases, the reports are prepared in consultation with the defendant's attorney and without input from the plaintiff's attorney. In other words, the examiner is not an "independent" but, rather, an agent of the defendant.

During other integral parts of the adversary process, such as deposition or trial, all parties have the right to two basic procedural safeguards: 1) the right to be represented by counsel, and 2) the right to have an objective record of the

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proceedings. The current advisory rulings in Multnomah County deny to plaintiffs the right to counsel at the DME stage, and they deny to both parties the right to have an objective record of the proceedings. These advisory rulings are not mandated under ORCP 44; rather, they are a matter of court interpretation, since ORCP 44 is silent on these issues.

Objective Record of the Proceedings

Both sides should be allowed to record the examination. Audiotape recording was done many times during the breast implant litigation, based on a standing order entered by Judge Stephen Walker and followed by Judges Frank Bearden and Nely Johnson. This order was entered after disputes arose over what was said and done during defense psychiatric and neuro-psychiatric examinations. After the order allowing recording was in place, there was never another dispute of this type, because the audiotape served as the record of the proceedings.

Presence of Counsel

Plaintiff's counsel (or a designated representative) should be allowed to attend the DME as an observer. As with a deposition, counsel should not be allowed to interfere with or obstruct the examination, but should be allowed to note objections (if any) on the record for preservation purposes. The recording should serve as the record of the proceedings, and counsel should not be allowed or compelled to testify as to what was said or done during the examination.

Vocational Rehabilitation Exams

This ruling does not need to be revisited. The important issue for plaintiffs is that there be only one examination, and ORCP 44A specifies that the examiner be a physician (for a physical or mental examination) or a psychologist (for a mental examination).

Enclosures

The following documents are enclosed:

1. *Another View: ORCP 44, fairness and the search for truth*; article by Don Corson published in Oregon State Bar Bulletin, 4/99.

2. Letter opinion, *Winkler v. Morgan*, Clackamas County No. 90-8-394; ruling by Hon. Robert J. Morgan (allowing attorney to attend DME).

3. Order, *Modrich v. Josephine Memorial Hospital*, Josephine County No. 93-CV-0032; ruling by Hon. Gerald Neufeld (allowing representative to attend DME).

4. Order, *Strain v. Familian Northwest, Inc.*, Jackson County No. 98-1169; ruling by Hon. Ross Davis (allowing recording of DME).

5. Order, *Sarantis v. Farmers Insurance Company*, Lane County No. 16-97-08322; ruling by Hon. Jack Mattison (allowing recording of DME).

6. Advertisement, Columbia Medical Consultants, Inc.

Again, thank you for your attention to this matter, and feel free to contact me if you or the other members of the Motions Panel have questions or need additional information.

Very truly yours,

GAYLORD & EYERMAN, P.C.

Linda K. Eyerman

Linda K. Eyerman
LKE:dh
Enclosures

Oregon Trial Lawyers Association
Letter to Judge Janice R. Wilson
January 19, 2000

Enclosure 1:

***Another View: ORCP 44, fairness and the search for truth*;**
article by Don Corson published in Oregon State Bar Bulletin, 4/99.

Another View

ORCP 44, fairness and the search for truth

By Don Corson

Proposed Oregon Rule of Civil Procedure 44F would allow a private examination of a represe defendant in a civil action by an in- ator hired by plaintiff's counsel. The proposal has stiff opposition: What about the right to effective assistance of counsel?, asks one critic? This would do violence to our procedural traditions and would deny due process, says another. How can you expect the truth to come out of *that* exam? snorts a third. The proposal doesn't pass the smell test, complains a fourth. (See related article, page 15.)

Proposed ORCP 44F is a fiction. But the fact is that existing ORCP 44A-D practice raises even more troubling questions about fairness and the search for truth. On paper, ORCP 44A provides that when a party's mental or physical condition is in controversy, for good cause shown, a court has discretion to order the party to submit to an judicially specified exam. In practice, injured persons are routinely sent to exams without a showing of good cause, without judicial supervision, without an independent record of the proceedings and without basic procedural safe- s to ensure fairness and accuracy.

EVOLUTION OF EXAM PRACTICE

A compulsory medical exam is an invasive procedure, intruding into a person's most private and personal matters. However, as originally conceived and applied, an occasional court-ordered medical exam made sense. Before modern discovery rules, some lawyers did not disclose medical records or selectively furnished only some of the relevant records. The defendant then had legitimate need to learn about the injuries in controversy. Where there was good cause for such an exam, the court had discretion to order one. Typically, a local doctor was chosen who was subject to the court's limitations on the "time, place, manner, conditions and scope" of the exam, as is now required by ORCP 44A. A local doctor was subject to the normal professional constraints of a community of practicing physicians. A doctor whose living came treating patients, and who only occa ally was asked to do an exam for litiga was not likely to become a systemati biased advocate.

A doctor whose living came from treating patients, and who only occasionally was asked to do an exam for litigation, was not likely to become a systematically biased advocate.

The problem is, the practice evolved to the point that ORCP 44 ex are now routine. These exams are monly, but incorrectly, called "indep ent medical exams."[1] A lucrative exan dustry has sprung up, including out-of-town businesses that bill insurance companies and defense counsel in the six and sometimes seven figures annually and which routinely grind out reports saying that the plaintiff has a pre-existing condition, is malingering, has unrelated psychological problems or has no significant residual injuries. Many of these businesses employ practitioners who primarily (or sometimes exclusively) practice "litigation medicine" – not traditional medicine involving treatment of a patient, but the writing of reports and giving testimony for litigation.[2]

THE ORCP 44 EXAM

What goes on in these ORCP 44 exams? In practice, defense examiners can conduct an unsupervised second deposition, asking questions about the accident, the person's background and other matters. Such a fishing expedition typically is

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lone without the safeguards of the person's counsel being present, an independent record or judicial oversight. There is no effective check on whether tests were done appropriately or whether test results or examinees' answers are recorded accurately or completely. A report to defense counsel is prepared, sometimes with an unknown number of drafts.

What *should* go on in an ORCP 44 exam? The person should not be subjected to painful or invasive tests, cumulative or unnecessary procedures, health risks or embarrassment or humiliation, and the examined person should be entitled to refuse certain procedures.[3] The scope of the exam should be limited to injuries claimed to have been caused by the tortfeasor.[4]

Only a "physician" (or, for a mental exam, a "psychologist") may conduct an ORCP 44 exam. The court determines who may conduct the exam; the order is to specify "the person or persons by whom it is to be made."[5] The examiner should be qualified to conduct an examination for the particular condition in controversy. A party should not have a unilateral right to select the examiner. The Oregon Supreme Court once said that "[i]f plaintiff has any objection to being examined by the doctor suggested by the defendant, the court should designate some physician of competent skill, indifferent between the parties."[6] Other courts agree that a party cannot unilaterally determine the choice of examiners; the choice is ultimately for the court.[7]

An ORCP 44 exam is appropriate when "the mental or physical condition or the blood relationship" of certain persons is "in controversy;" "for good cause shown." Of all the rules of discovery, ORCP 44 is unique. Depositions, document requests and requests for admissions may be premised on simple relevance and the reasonable calculation that they may lead to admissible evidence. None of the other discovery tools requires judicial action to be initiated. Only ORCP 44 adds additional requirements of "in controversy," a showing of "good cause" and a court order.

The first element ("mental or physical condition") rarely presents a problem. The second element ("in controversy") can be problematic. For example, when is a mental condition in controversy? As an initial matter, generally a party affirmatively puts a condition in controversy in that party's pleadings; the other party should not be allowed to "bootstrap" a controversy with responsive pleadings. For example, alleging a claim for outrageous conduct involving infliction of severe emotional distress or causing a psychiatric condition may put the plaintiff's mental condition in controversy. A garden variety allegation of emotional distress, of the normal type that accompanies pain and suffering from an injury, should not justify a mental exam.[8] When is a physical condition in controversy? There may not be a bright line, but *past* injuries or pain and suffering should not justify an exam, because they are no longer in issue.[9]

The third element required to justify a court-ordered exam, a showing of "good cause," is frequently ignored or not thoughtfully considered. "Good cause," a concept well-developed in other areas of Oregon law, is not addressed by any ORCP 44 appellate case. Elsewhere, a showing normally requires that the moving party submit admissible, relevant evidence. Good cause is not shown simply by the fact that a party is injured or has a health problem.[10] Further, if the movant is able to obtain the desired information without an exam, there may not be good cause.[11] If the available medical records are adequate, an exam would develop cumulative evidence, and may therefore not be needed.[12] Even if good cause is shown, ORCP 44 is permissive, not mandatory: the court "may" order an exam. Whether to order an exam is for the court's sound discretion.[13]

NEED FOR PROCEDURAL SAFEGUARDS

Oregon's rule does not specify many of the nuts and bolts of procedure. There is little Oregon appellate guidance, and most cases citing ORCP 44 do not address exam procedures.[14] Other states have addressed procedures for court-ordered medical examinations, either by rule or by case law. The need for procedural safeguards should be clear. Otherwise, as Justice Douglas put it, if a party is simply turned over to "doctors and psychoanalysts to discover the cause of the mishap, the door [would] be open for grave miscarriages of justice."[15]

What should be the record of the exam? Under ORCP 39, ordinary deposition testimony is to be recorded. Fairness suggests that a person examined under ORCP 44 should also have the right to record the exam. Otherwise, there is no record of the proceeding – only a letter that is exclusively controlled by the examiner. Some states provide for audio,[16] video[17] or stenographic[18] recording of exams. Oregon trial court rulings appear to vary; there is no real appellate guidance.[19] The examinee's right to record the exam should be affirmed either by Oregon appellate decision or by express rule.

Who may be present at the exam? There is no physician-patient relationship in an ORCP 44 exam. An exam by a physician hired by the adverse insurance company or counsel is an adversarial proceeding that can be intimidating to the injured person. This is especially so where the person is young, disabled, has been traumatized, has had negative experiences with medical personnel, has suffered brain injury, or has language problems, among other reasons.

Having a representative present may be comforting to the person examined and provide some balance to this inherently unequal situation. Many states provide that the person examined has the right to have a representative present.[20] The argument that the presence of a third party somehow interferes with a medical exam is contradicted by common sense and actual practice; for example, some exam businesses expressly note that third parties may be present.[21] Under pre-ORCP Oregon law, the trial court had

discretion to determine who may be present at a court-ordered medical exam, including the injured person's attorney.[22] By rule or decision, the examined person should have the right to have a representative of his or her choice present, subject to judicial control over the representative's conduct.

What questions should an ORCP 44 examiner be allowed to ask? Certainly, a "physical examination" suggests that the person may need to answer questions such as, "Does this hurt?" and, "How far can you move this arm?" Just as certainly, an examiner should have no business asking the person the color of the other car.[23] Medicine distinguishes between a "history" and "physical examination." ORCP 44 provides for mental and physical exams, but does not mention the taking of histories. Some attorneys instruct [illegible]ents not to give histories or fill out [illegible] on the grounds that this would go beyond the provisions of the rule. Furthermore, under Oregon discovery practice, extensive medical records containing the relevant medical history are usually made available in injury cases, which undercuts any argument that the examiner needs to take an oral history. It would be helpful to have some guidance, by decision or by rule, limiting the examiner's questions to those necessary for the "examination" of the injuries in controversy.

Where should the exam take place? Pre-ORCP Oregon case law suggested that an order can provide that "the examination be so conducted as to cause the litigant examined as little inconvenience as possible ...."[24] In general, assuming that there are physicians in the relevant specialty in the county where the action is pending or the community where the plaintiff resides, it makes sense to hold the exam there. The rule, or appellate decision, should so provide.

[illegible]OVERY

The right to cross-examine witnesses is fundamental to our adversary system of justice. Cross-examination is considered

the trial's great engine to search for the truth. Effective cross-examination requires that the attorney have access to relevant facts. That is one reason why the examined person's representative should be able to observe an exam. That is also the reason there should be full document discovery of the examiner's notes, correspondence, drafts and dictations.

This does not mean that there should be pretrial depositions of ORCP 44 examiners on the merits of their reports. Although Oregon's attorney-client privilege prohibits discovery of an adverse party's experts, in legal theory an ORCP 44 examiner should be considered a court-appointed expert, not a party's expert.[25] There is no general legal bar to relevant discovery directed to a person who is not a party's expert. Nonetheless, Oregon trial court judges have wisely avoided dis- depositions about ORCP 44 ex-ns. Pretrial discovery of expert witnesses would add an additional level of cost in a system already so burdened by expense that some modest but legitimate disputes are priced out of our courts.

Oregon trial courts are split on the issue of document discovery relevant to the examiner's bias.[26] Document discovery, as compared to depositions, is generally less expensive. There appear to be a handful of businesses that account for a large volume of the ORCP 44 exams, and allowing discovery of such things as business tax returns and financial records would permit a more meaningful inquiry into the issues of bias and credibility. Sharing of documents would obviate the need to ask for the same documents repeatedly, thereby promoting efficiency.[27] Without document discovery, a witness's testimony is unfettered by the facts revealed in the documents. The value of cross-examination depends on the ability to impeach, and the ability to impeach depends in part upon having access to rele- documents. Such discovery should be ed.

CONCLUSION

Justice Douglas warned that adver-

s[illegible]tors – what he termed "prejudiced medical eyes" – "will naturally be inclined to go on a fishing expedition in search of anything which will tend to prove" their party's case.[28] Once parties "are turned over to medical or psychiatric clinics for an analysis of their physical well-being and the condition of their psyche, the effective trial will be held then and there and not before the jury. ... The doctor or the psychiatrist has a holiday in the privacy of his office ... The [party] is at the doctor's (or psychiatrist's) mercy; and his report may either overawe or confuse the jury and prevent a fair trial."[29]

Why should we care about ORCP 44, fairness and the search for truth? Beyond the fact that ORCP 44 is a two-edged sword (it can be turned on either plaintiffs or defendants), unfair pretrial procedures fuel public cynicism about our courts. Recent Oregon public opinion polls find that public trust in our court system is low, and falling. A perceived major problem is that the rich [illegible]werful have an unfair advantage, [illegible]oo many people cannot even afford a lawyer. The public needs to have confidence that the legal playing field is level.

If we care about the world's best democratic system for the peaceful resolution of civil disputes, we should care about the need for procedural safeguards in compulsory medical examinations. ■

ABOUT THE AUTHOR

Don Corson is a shareholder in the Eugene law firm of Johnson, Clifton, Larson & Corson. He is currently president of the Oregon Trial Lawyers Association. The views expressed in this article are his own.

ENDNOTES

1. ORCP 44, like its parent rule, FRCP 35, does not call a court-ordered exam "independent," or an "IME." Such exams are adversary proceedings.

2. *See, e.g.*, "Doctors for Sale," *Willamette Week*, Vol. 23, Issue 2 (November 13, 1996) at p.16 *passim*.

3. *See, Acocella v. Montauk Oil Transp. Corp.*, 614 F. Supp. 1437 (S.D.N.Y. 1985); *Duprey v. Wager*, 451 A.2d 416, 419 (N.J. 1982); *Carrig v. Oakes*, 18 N.Y.S.2d 917 (N.Y. 1940); *Mackay Telegraph-Cable Co. v. Armstrong*, 241 S.W. 795, 797 (Tex. 1922); *Gilbreath v. Prairie Oil & Gas Co.*, 278 P. 707, 711 (Kan. 1929).

[illegible]*e Nitzel v. Jackson*, 879 P.2d 1222 (Okla. 1994) [illegible]nent discovery limited to medical records relating to accident injuries).

5. ORCP 44A.

6. *Carnine v. Tibbetts*, 158 Or. 21, 34, 74 P.2d 974 (1937) (pre-ORCP). *Bridges v. Webb*, 253 Or. 455, 455 P.2d 599 (1968), a later pre-ORCP case, said that the *Carnine* statement was dicta, and suggested that an examinee's objections must be "substantial."

7. *See, Stinchcomb v. United States*, 132 F.R.D. 29, 30 (ED Pa. 1990) (defendant cannot unilaterally select the examiner); *Stuart v. Burford*, 42 F.R.D. 591, 592 (N.D. Okla. 1967) (defendant cannot unilaterally select examiner); *Martin v. Superior Court*, 104 Ariz. 268, 451 P.2d 597 (1969) (if serious objection, trial court has duty to determine); *Hagmier v. Consolidated Rail Corp.*, 545 N.Y.S. 2d 861 (A.D. 4 Dept. 1989) (select another examiner if there is history of bias or hostility); *White v. State Farm Mut. Auto Ins. Co.*, 680 So.2d 1 (La. App. 3 Cir. 1996) (disallow examiner with documented history of advocacy against injured litigants); *Munz v. Peters*, 291 N.Y.S. 2d 521 (1968) (court has discretion to appoint physician, or decline defendant's choice, in interests of justice); *Liechty v. Terril Trucking Co.*, 53 F.R.D. 590 (E.D. Tenn. 1971) (court will select practitioner if parties cannot agree).

8. *See, Cody v. Marriott Corp.*, 103 F.R.D. 421, 423 (D. Mass. 1984) (mental condition not in controversy for simple claim for emotional distress, as distinguished from a claim of psychiatric injury or disorder requiring professional treatment); *O'Quinn v. New York University Medical Center*, 163 F.R.D. 226 (S.D.N.Y. 1995) (mental condition not in controversy in employment discrimination action where there was no independent tort claim for emotional distress and no allegation of "severe" emotional distress); *Robinson v. Jacksonville Shipyards Inc.*, 118 F.R.D. 525, 531 (M.D. Fla. 1988) (denying defendant's request for a mental exam in a sexual harassment case alleging stress and serious adverse effect to psychological well-being); *see also Sabree v. United Brotherhood of Carpenters and Joiners of America, Local No. 33*, 126 F.R.D. 422, 426 (D. Mass. 1989) (no discovery of plaintiff's psychotherapist's records in a "garden variety" claim for emotional distress).

9. *Coca-Cola Bottling Co. v. Negron Torres*, 255 F.2d 149 (1st Cir. P.R. 1958); *Bridges v. Eastman Kodak Co.*, 850 F.Supp 216, 222 (S.D. N.Y. 1994).

10. *See Schlangenhauf v. Holder*, 379 U.S. 104, 118-119, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (good cause is not a mere formality, but a limitation on court-ordered exams; the standard is not met by conclusory allegations of the pleadings, or by mere relevance, but can be established by the pleadings in appropriate cases).

11. *See Martin v. Tindell*, 98 So.2d 473, 475 (Fla. 1957); *Hughes v. Groves*, 47 F.R.D. 52, 57 (W.D. Mo. 1979); *Petition of Trinidad Corp.*, 238 F.R.D. 928, 935 (Va. 1965); *Marroni v. Matey*, 82 F.R.D. 371 (E.D. Pa. 1979); *see also Schlagenhauf, supra*.

12. *See Richardson v. Johnson*, 444 S.W.2d 708 (Tenn. 1969) ("examination cannot be had merely to obtain cumulative evidence").

13. Under pre-ORCP Oregon law, a motion for an exam was addressed to the discretion of the court. *Dorn v. Wilmarth*, 254 Or. 236, 458 P.2d 942 (1969).

14. Post-ORCP 44 cases include: *Boline v. Whitehead*, 119 Or. App. 230, 850 P.2d 1128 (1993) (sanctions for failure to appear at a court-ordered exam); *Smith v. Children's Services Div.*, 120 Or. App. 506, 852 P.2d 957 (1993) (no prejudicial error in failing to exclude testimony of ORCP 44 physician who did not prepare report); *Morris v. Fred Meyer, Inc.*, 103 Or. App. 236, 795 P.2d 1115 (1990) (trial court discretion to exclude testimony of psychiatrist who did not produce report); *Martin v. Bohrer*, 84 Or. App. 7, 733 P.2d 68 (1987) (plaintiff may seek recovery for additional injuries sustained in ORCP 44 exam); *Barry v. Don Hall Laboratories*, 56 Or. App. 518, 642 P.2d 685 (1982) (no abuse of discretion in failing to exclude testimony for physician's late delivery of report).

15. *Schlagenhauf v. Holder, supra*, 379 U.S. at 125.

16. *See, e.g.*, Arizona R. Civ. P. 35(a); Calif. Code of Civil Procedure §2032(g); *Jacob v. Chaplin*, 639 N.E.2d 1010, (Ind. 1994); WA Court Rule 35(a).

17. *See, e.g.*, Arizona R. Civ. P. 35 (upon showing of good cause); *Broyles v. Reilly*, 695 So.2d 832 (Fla. 2nd DCA 1997).

18. *See, e.g.*, Calif. Code of Civil Procedure, §2032(g).

19. In *Boline v. Whitehead, supra*, 119 Or. App. 230, the trial court had ordered a tape recording of the exam, but that was not an issue on appeal.

20. *See, e.g., Langfeldt-Haaland v. Saupe Enterprises*, 768 P.2d 1144 (Alaska 1989) (examinee's lawyer may attend); *Munoz v. Superior Court of Santa Clara County*, 26 Cal. App.3d 643, 102 Cal. Rptr. 686 (1st Dist. 1972); *Brompton v. Poy-Wing*, 704 So.2d 1127 (Fla. 4 DCA 1998) (attorney generally may attend); *Broyles v. Reilly*, 695 So.2d 832 (Fla 2d DCA 1997); Michigan Court Rule 2.311 (order for exam may allow plaintiff's counsel to attend); *Reardon v. Port Authority*, 132 Misc.2d 212, 503 N.Y.S.2d 233 (1986) (attorney may attend mental exam); Okla Stat. tit. 12, section 3235(D); *McCullough v. Mathews*, 918 P.2d 25 (Okla. 1995) (representative may be person's attorney); WA Court Rule 35(a) (allows presence of attorney); *Tietjen v. Department of Labor and Industries*, 313 Wash. App. 86, 534 P.2d 151 (1975) (attorney may attend physical and mental exam).

21. *See, e.g.*, Western Medical Consultants, Inc.'s form ("You may want to bring one person with you into the exam, unless your examination involves a psychiatric review"); *see also Tri-Met, Inc. v. Albrecht*, 308 Or. 185, 777 P.2d 959 (1989) (upholding finding in workers compensation context that presence of claimant's lawyer did not constitute obstruction of the exam).

22. *Pemberton v. Bennett*, 234 Or. 285, 381 P.2d 705 (1963).

23. Although this, and similar non-medical questions, are asked in practice. *See, e.g.*, Gota affidavit filed in Lane County Circuit Court case no. 16-97-03822.

24. *Carnine, supra*, 158 Or. at 34. *But see* pre-ORCP 44 *Bridges v. Webb, supra* (Roseburg area examinee seen by Medford doctor; in unreported trial court proceedings, plaintiff apparently had failed to attend exam, without advance notice).

25. Even before adoption of the ORCP, a defense medical examiner could be called as plaintiff's trial witness. *Nielson v. Brown*, 232 Or. 426, 374 P.2d 896 (1962). *But see Bridges v. Webb, supra*, 253 Or. at 456 (dictum that a defense medical examiner was there considered the defendant's expert witness).

26. See DeVore, "The New Discovery Battle - Money and the Independent Medical Exam," in this issue of the *Bulletin*.

27. *See, e.g., Burlington City Bd. of Education v. U.S. Mineral Products Co.*, 115 F.R.D. 188, 190-91 (M.D.N.C. 1987) ("courts considering this matter have overwhelmingly and decisively endorsed the sharing of discovery among plaintiffs); *Olympia Refining Company v. Carter*, 332 F.2d 260 9th Cir. (1964); *Kraszewski v. State Farm General Ins. Co.*, 139 F.R.D. 156, 159 (N.D. Cal 1991); *Raymond Handling Concepts v. Superior Court*, 45 Cal. Rptr. 2d 885, (Cal. App. 1 Dist. 1995); *Garcia v. Peeples*, 734 S.W.2d 343, 346 (Tex. 1987).

28. *Schlagenhauf, supra*, 379 U.S. at 125.

29. *Id.*

Oregon Trial Lawyers Association
Letter to Judge Janice R. Wilson
January 19, 2000

Enclosure 2:

Letter opinion, *Winkler v. Morgan*, Clackamas County No. 90-8-394; ruling by Hon. Robert J. Morgan (allowing attorney to attend DME).

CI CUIT COURT OF OREC N

FIFTH JUDICIAL DISTRICT
CLACKAMAS COUNTY COURTHOUSE
OREGON CITY, OREGON 97045-1821

. MORGAN
UIT JUDGE

(503) 655-8685

June 24, 1991

Mr. Nick Chaivoe
Attorney at Law
720 S.W. Washington Street
Portland, OR 97205

Mr. William Stockton
Schwenn, Bradley, Batchelor,
Brisbee and Stockton
139 N.E. Lincoln
Hillsboro, OR 97123-0567

RE: Winkler v. Morgan
Case No. 90-8-394

entlemen:

The legal question before me is whether or not under the circumstances of this case, plaintiff, James Winkler, has a right to have his attorney present for the independent medical examination where the doctor has been selected by the defense.

My research has indicated that there are many arguments advanced on both sides of this issue. Most of those arguments were raised by you gentlemen as well.

In Pemberton v. Bennett 381 P2d 705, 234 Or. 285 (1963) which would appear to be the most recent Oregon Decision that in a general way dealt with the issue, the Oregon Supreme Court held that the Trial Court's Decision not allowing plaintiff's attorney to be at the medical examination was not an abuse of judicial discretion. It would appear the Ruling left total discretion with the Court as to whether plaintiff's attorney is to be permitted at the examination or not. Certainly the Court's Decision in Pemberton reflects its concern over medical examinations being converted into adversarial proceedings. However, it is clear from the Decision that the Court was aware

EXHIBIT B PAGE 1

that medical objectivity at these examinations unfortunately is not always present. The Court in Pemberton failed to set out specific guidelines on when counsel is allowed to be present at independent medical examinations. The Court did state that there [illegible] certain occasions dealing with the examinee, the examiner, [illegible]e nature of the proposed examination or the nature of the medical problem which might allow and persuade the Court to permit plaintiff's counsel to be present at the examination. Pemberton, at page 288.

Some recent cases tend to indicate that plaintiff's attorneys presence at these examinations should be permitted. In Langfeldt-Haaland v. Saupe Enterprises, Inc. 768 P.2d 1144 (Alaska 1989), the Alaska Supreme Court held a party in a civil action had the right to have his attorney present during an examination by a physician hired by his opponent. See also Sharff v. Superior Court, 44 Cal. 2d 508, 282 P.2d 896 (1955). The California Court ruled that the plaintiff in a personal injury action was entitled to have the assistance of an attorney during an examination by defendant's doctor. The states of Florida, New York and Washington permit an attorney to attend independent medical examinations. See Bartell v. McCarrick, 498 S.2d 1378 (Fla. App. 1986); Reardon v. Port Authority, 132 Misc.2d 212, 503 NYS.2d 233 (1986); Tietjen v. Department of Labor and Industries, 313 Wash. App. 86 534 P.2d 151 (1975).

In Langfeldt-Haaland the Alaskan Court stated that "parties are in general entitled to the protection and advice of counsel when they enter the litigation arena", at page 1146. The Court Langfeldt was concerned about protecting the right to counsel [illegible] civil cases arising from the due process clause.

In Sharff the Court stated "whenever a doctor selected by the defendant conducts a physical examination of the plaintiff, there is a possibility that improper questions may be asked and a lay person should not be expected to evaluate the propriety of every question at his peril." See Sharff at page 897. The Court made a point of the fact that a physician patient relationship does not exist when the plaintiff is examined by the defendant's doctor.

If would appear that the Federal law favors defendant's position and point of view on this issue. Note McDaniel v. Toledo, Peoria and Western Railroad Company, 97 F.R.D. 525 (1983). This 1983 Federal case indicated that it was particularly persuaded by two federal cases, a 1969 case out of the State of Delaware and a 1960 case out of the State of Maryland (Warrick v. Brode, 46 F.R.D. 427 (Del. 1969), Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (MD. 1960). McDaniel indicates that there are two compelling reasons for their decision "First, the Court noted that a medical examination should be divested as far as possible of any adversary character"

-- "Second, the Court noted the potential of creating problems under the cannons of professional ethics" --"When an attorney observes the examination of his client he creates the possibility that he may have to impeach the examining physician through his own testimony" hence the lawyer may end up testifying in his client's case.

Certainly there are sound and rational arguments on both sides of this issue. The Court is persuaded that it may well be a denial of due process to bar the plaintiff's attorney from these examinations, especially when appropriate safeguards can and will be taken to protect the tranquility of the examination process and defendant's legitimate concerns. As has been stated in the cases there is no physician patient relationship or privilege between the proposed doctor and plaintiff. Plaintiff's counsel here has articulated what he perceives as elements of unfairness in not permitting him to be at the examination because as he states, the examining doctors at most I.M.E.s in his experience are advocates for the defendant and ask inappropriate questions of the plaintiff. Plaintiff thereby has made some showing that there is a reasonable basis for the presence of plaintiff's attorney at the examination. In making this decision, the Court is not unmindful of the potential for mischief and discord and the potential advantage plaintiff may gain at the time of trial. This however must be weighed against the plaintiff's right to counsel and the potential for damage to the plaintiff's case if presence of counsel is denied during the I.M.E. examination.

RULING OF THE COURT

The Ruling of the Court is that plaintiff's attorney is permitted to attend the examination of plaintiff by the defendant's doctor as long as the plaintiff requests that the attorney be present. However, plaintiff's attorney can only observe and plaintiff's attorney must stay a reasonable distance from the doctor and the plaintiff during the examination process. Plaintiff's attorney must, if at all possible, remain seated in one place that is within hearing and seeing distance of the examination. Plaintiff's attorney is not permitted to directly or indirectly obstruct or intimidate the doctor or the doctor's examination. Plaintiff and plaintiff's attorney should strive to have no verbal communication during the examination unless such communication is absolutely necessary in the opinion of plaintiff's attorney.

It is the further Ruling of the Court that plaintiff's counsel must inform defendant's counsel at least ten days prior to trial as to whether or not plaintiff's attorney in cross examining the doctor will use information and observations gained from the attorneys presence at the examination. Plaintiff's

attorney must be specific in relating such information and plaintiff's attorney will not be permitted to cross examine defendant's doctor concerning said information unless such a disclosure is made. Obviously if something unexpected comes up in the doctor's testimony, there may be reason to make an exception to this rule. The Trial Judge can handle those questions.

Mr. Chaivoe may prepare the appropriate Order.

Very sincerely,

Robert J. Morgan
Circuit Court Judge

RJM/cd

EXHIBIT B PAGE 4

CERTIFICATE OF TRUE COPY

I hereby certify that the foregoing copy of: POLICY HOLDER'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR ORDER COMPELLING PSYCHIATRIC EXAMINATION is a complete and exact copy of the original.

DATED this 25 day of February, 1997.

Peter Glazer #78221
Of Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing: POLICY HOLDER'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR ORDER COMPELLING PSYCHIATRIC EXAMINATION on the following attorney of record on this _____ day of February, 1997, by mailing to said attorney a true copy thereof, certified by me as such, with postage paid, addressed to said attorney at his/her last known address as follows, and deposited in the post office at Lake Oswego, Oregon, on said day:

Walter Sweek, Attorney for Insurer
Cosgrave, Vergeer & Kester
121 SW Morrison Street, Suite 1300
Portland, Oregon 97204

Frank Susak, Arbitrator
1450 American Bank Building
621 SW Morrison
Portland, Oregon 97205-3898

Larry Sokol, Arbitrator
735 SW 1st Avenue
Portland, Oregon 97204

Jim Gidley, Arbitrator
121 SW Morrison, Suite 460
Portland, Oregon 97204

DATED this _____ day of February, 1997.

Peter Glazer #78221
Of Attorneys for Plaintiff

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GLAZER & ASSOCIATES, P.C., Attorneys at Law
4500 Kruse Way, Suite 390, Lake Oswego, Oregon 97035 (503) 635-8801

Oregon Trial Lawyers Association
Letter to Judge Janice R. Wilson
January 19, 2000

Enclosure 3:

Order, *Modrich v. Josephine Memorial Hospital*, Josephine County No. 93-CV-0032; ruling by Hon. Gerald Neufeld (allowing representative to attend DME).

IME\ORDERS

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JOSEPHINE COUNTY

MARLA J. MODRICH and EUGENE L. MODRICH, Plaintiffs, v. JOSEPHINE MEMORIAL HOSPITAL, INC., an Oregon corporation; RANDALL CURRIER, M.D.; and JON ERMSHAR, M.D., Defendants.	NO. 93-CV-0032 ORDER ON MOTION TO REQUIRE PLAINTIFF TO APPEAR FOR EXAMINATION

This matter came before the Court, the Honorable Gerald C. Neufeld presiding, for oral argument on April 18, 1994, on the motion of Defendant Josephine Memorial Hospital Inc. to require Plaintiff to appear for a medical examination. Defendant Hospital was represented by counsel W. V. Deatherage, who appeared via telephone; Plaintiff Marla Modrich was represented by counsel Don Corson. The Court, having read the materials submitted by the parties, and having heard

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PAGE 1

SON, CLIFTON,
N & CORSON, P.C.
1050 Citizens Building
975 Oak Street

the arguments of counsel, is fully advised.

IT IS HEREBY ORDERED that Defendant Hospital's motion is granted in part, and that Plaintiff Marla Modrich is to submit to a medical examination at the office of Dr. Elias Dickerman, 124 N.W. Midland Avenue, Grants Pass, Oregon, on May 19, 1994, at 8:45 a.m.; however, the motion is denied to the extent it sought to prevent Ms. Modrich's daughter from being present at the examination, and her daughter is to be allowed to be present during the entire examination but is not to interfere with the examination.

DATED: 4-29-94

/S/ G. NEUFELD
Gerald C. Neufeld
Judge of the Circuit Court

EXHIBIT 15
PAGE 2

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CIVIL MINUTES

CASE NO: 95-6169-TC

DATE: April 29, 1996

CASE TITLE: Potter v. Mead

PRESIDING JUDGE: THOMAS M. COFFIN

DEPUTY CLERK: Leslie Malley

COURT REPORTER: Kristi Anderson

Record of telephone hearing on plaintiff's motion (#43) for order allowing medical exam under certain conditions: Ordered plaintiff's motion #43 granted. Monique Potter and Denise Butler Sharp may be present. Attorney Wiswall's oral motion to be present denied. Ordered Attorney Wiswall to submit to plaintiff by Wednesday a list of proposed questions that Dr. Painter will ask Monique Potter. Any further questions that may be raised by Dr. Painter may be asked in the presence of Denise Butler Sharp.

PLAINTIFF'S COUNSEL
Arthur Johnson

DEFENDANT'S COUNSEL
Michael Wiswall
Larry Brisbee
William Deatherage

cc: Chambers
Arthur Johnson
Larry Brisbee
John Hart
William Deatherage

EXHIBIT 16
PAGE 1

DOCUMENT NO: _____

LAW OFFICE OF PHIL GOLDSMITH
Phil Goldsmith
S[illegible]te 1200
[illegible] SW Columbia Street
Portland, OR 97201
Telephone: (503) 224-2301
FAX: (503) 222-7288

FAX TRANSMITTAL LETTER
Page 1 of 4 Pages

DATE: June 1, 1999

TO: OTLA office

FAX NO.: 223-4101

FROM: Phil Goldsmith

RE: Gochenour v. Orris

( ) Original mailed (X) Enclosures follow

COMMENTS:

Here is the opinion in Gochenour v. Orris. Due to limited time, we did not file a brief in this case; we just made an oral argument.

IF YOU NEED PAGES RE-TRANSMITTED, PLEASE CALL (503) 224-2301

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JOHN GOCHENOUR Plaintiff, v. MIKE ORRIS, Defendant.	No. 9712-10019 ORDER AND OPINION DENYING WITNESS DR. WHITE'S REQUEST FOR PROTECTIVE ORDER

At the request of the defense, Dr. John White performed the medical examination of the plaintiff pursuant to ORCP 44. The defense called Dr. White as a witness at trial, and at cross-examination, he was asked the amount of his income derived from "independent medical examinations." While the defense did not object to the question, Dr. White did express his desire not to answer, but did answer after being instructed to do so by the court. The question and the court's direction required that Dr. White give only the amount of income derived from performing independent medical examinations, including activities such as depositions and trial testimony related to those depositions. Dr. White was not asked, and he did not testify to, income from other sources.

After trial, Dr. White moved to have his testimony on this information sealed, and the information was placed under a temporary confidentiality order pending this decision.

In Oregon, there is presently some controversy over the extent to which a physician performing an independent medical evaluation under ORCP 44 is subject to deposition and to the

production of records, with different trial courts treating the matter differently. *See* Joel DeVore, "The New Discovery Battle," *OSB Bulletin* 15-18 (April 1999). The arguments in that controversy are not apposite here; the question before this court is simply whether once the testimony described has been elicited at trial it should be the subject of a protective order of confidentiality.[1]

First, there is the practical difficulty of making secret testimony which has been given in open court. There was no one present in the court room during this testimony aside from jurors, court personnel, the litigants, and their counsel, all of whom could be made subject to court direction not to disclose this portion of testimony. Similarly, the court's audio record of the proceedings could be sealed. The practical difficulties of such measures aside, the Oregon constitution's Article I §10 provision for the open administration of justice prohibits a confidentiality order. While there are some interests which outweigh the Article I § 10 open administration of justice provision, this does not come close to such an interest. *See* State ex rel Oregonian Pub. Co. V. Deiz, 289 Or 277, 284 (1980) (noting that jury deliberations and court conferences may be held in private); Union Pacific Railroad Co. v. Department of Revenue, 10 OTR 235, 240 (1986) (noting that the public may be excluded when trial proceedings involve trade secrets, when necessary to maintain order in the courtroom or to eliminate bias or

---

[1]The question of the admissibility of the trial testimony is technically not at issue here. Defense counsel did not object to the question which elicited the testimony, and it is Dr. White's motion on his own behalf which brings this matter before the court. Even if there had been an objection by defense counsel, the evidence would have been received. Where an expert medical witness' entire professional income is derived from performing independent medical examinations and related services, the total income derived from those services and the total amount of time spent performing those services is relevant impeaching evidence and is not protected on a theory of witness privacy.

prejudice); *See also* State ex rel KOIN-TV, Inc. v. Olsen, 300 Or 392 (1985) (trial judge had discretion to deny station's request to copy videotaped testimony).

Witness Dr. White's Motion for Continued Protective Order is denied.

IT IS SO ORDERED.

DATE SIGNED: May 28, 1999

Robert W. Redding, Circuit Judge

Oregon Trial Lawyers Association
Letter to Judge Janice R. Wilson
January 19, 2000

Enclosure 4:

Order, *Strain v. Familian Northwest, Inc.*, Jackson County No. 98-1169; ruling by Hon. Ross Davis (allowing recording of DME).

Post-it® Fax Note 7671	Date	# of pages ▶
To Tom D'Amore	From Mike Brian	
Co./Dept.	Co.	
Phone #	Phone #	
Fax #	Fax #	

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF JACKSON

MARVIN STRAIN and ANNETTE STRAIN, Plaintiffs,	)	Case No. 98-1169-LI
vs.	)	ORDER
FAMILIAN NORTHWEST, INC.; RON JONES; and BOB GOODWIN; Defendants.	)	

This matter came before the court on the motion of defendants to preclude or condition the tape recording of medical exams of Plaintiff Marvin Strain previously ordered by the court. Plaintiffs appeared by and through their attorney, Michael Brian. Defendant, Familian Northwest, Inc., appeared in person through its attorney, Michael Halligan. Defendant Goodwin appeared by telephone through his attorney, Eric Yandell. The court considered the argument of counsel and is fully advised in the matter. Now, therefore, it is hereby

ORDERED as follows:

1. Any party may tape record the medical exams;

2. Promptly upon conclusion of each medical exam, any party who has tape recorded the session will deliver a true and complete copy of the tape to other counsel;

3. The court will not presently limit the purposes for which the tape recording may be used. No party waives further objections to its use, and the court will consider and rule upon each objection as it arises.

4. There being no objection from Defendants, Annette Strain may attend the medical exam of Marvin Strain.

Dated this 7 day of ~~May~~ June, 1999.

Ross Davis, Circuit Judge

SUBMITTED BY:

Eric Yandell, OSB #79457
Heltzel, Upjohn, Williams,
Yandell & Roth, P.C.
P.O. Box 1048
Salem, OR 97308
Telephone: (503) 585-4422
Of Attorneys for ~~Plaintiff~~ Defendant
Goodwin

m

m: listmaster@otla-online.org on behalf of JFried1234@aol.com
it: Friday, May 14, 1999 4:49 PM
list@otla-online.org
oject: Dr. Scott Jones and his (Brisbee and Stockton's Motion to Quash)

[redacted]hopedist Scott Jones did a DME on my client.
subsequently served a Notice of Deposition and a Subpoena Duces Tecum on Dr
nes directing him to bring the following: 1. documents of billing records
garding IMEs performed by Dr Jones in the past 5 years; 2. documents which
flect the amount of and dates of IMEs performed in the last 5 years; 3.
cuments which show the % of his practice devoted to doing IMEs in the last
years; 4. any contractual or other documents between Jones and the entities
r which he does IMEs in the last 5 years; 5. copies of the IMEs performed
Jones in the last 5 years (with patient names' redacted); and 6.any
cuments, notes or other material related to the IME performed on plaintiff.
Barbara Johnston (of Brisbee and Stockton) filed a motion to quash 2
ys after service had been effectuated. She sought to quash the notice of
po and the subpoena in its entirety. She further sought Dr Jones fees (for
s own time in preparing a 7 page self-serving affidavit) as well as his
torney fees and costs.

Robert Selander, Clackamas County Circuit Court Judge heard the motion
Monday. He ordered the dr to provide the notes per ORCP44c. He granted
e motion to quash in all other respects. He then took the fee request
der advisement. Defense argued ORCP55 and ORCP36b were authority for such
es. I argued that the rules simply allowed a court to assess a reasonable
e to produce documents, but it did not allow a court to assess a fee for
t producing documents. Judge Selander decided yesterday to deny the fee
tition.

I need anything anybody has on Dr Scott Jones. Any help is appreciated.

[redacted]ill have a copy of the Notice of Depo, the Subpoena, the Motion to
ash and Plaintiff's Response to the Motion in the OTLA office come Monday.

Thanks. Jon Friedman 242-1440

GLAZER & ASSOCIATES, P.C.
Attorneys at Law

Peter Glazer

irk L. Emmons*

atrick R. Berg**
[redacted]isel

Edwin J. Welsh
(1915-1994)

Kruseway Plaza
4500 Kruse Way, Suite 390
Lake Oswego, Oregon 97035-2563

Telephone (503) 635-8801

May 12, 1999

Esther V. M. Nelson
legal assistant

Ted Rogers
legal assistant
(1946-1998)

Fax (503) 635-1108
*also licensed in California
**also licensed in New York and Vermont

Editor, The Bulletin
Oregon State Bar
5200 SW Meadows Road
Lake Oswego, OR 97035

Re: "Independent Medical Examination" Articles
April 1999 OSB Bulletin

Dear Editor:

Don Corson's April 1999 article regarding defense medical examinations makes some very good points. I have long been convinced that these so-called "independent" examinations are the most abusive procedure an innocent victim has to go through in our court system. Maybe things were different 30 or 40 years ago but these days, for example, one so-called IME outfit advertises to adjusters that "Frankly, we don't believe there should be anything '***Independent***' about an Independent Medical Examination". These IME doctors go on to promise insurance adjusters that after every [redacted]view or evaluation, a phone call is made to the adjuster from the examining physician before a report is generated.

Who among us would want a family member of ours to be examined by that kind of "independent" doctor, and subjected to questioning (some relevant and some irrelevant) without the opportunity to have counsel (or even a lay person) present and without the right to make an audio tape recording? None of my friends in the defense bar or on the bench would want their spouse, parent, or adult child to undergo such an adversary examination all alone with no record.

In virtually all other states, an injured person may be accompanied by someone and/or may make a tape recording. If you are injured in an accident across the Columbia River, and later examined by an IME doctor in Portland (which occurs with regularity), you may have a representative present and tape record the exam.

Sincerely,

GLAZER & ASSOCIATES, P.C.

Peter Glazer

PG:df C:\PG Personal\Oregon State Bar Ltr 02.wpd

Oregon Trial Lawyers Association
Letter to Judge Janice R. Wilson
January 19, 2000

Enclosure 5:

Order, *Sarantis v. Farmers Insurance Company*, Lane County No. 16-97-08322; ruling by Hon. Jack Mattison (allowing recording of DME).

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

SANDRA J. SARANTIS,

Plaintiff(s),

vs.

FARMERS INSURANCE COMPANY OF OREGON, an Oregon corporation,

Defendant(s).

Case No. 16-97-08322

ORDER

THIS CAME before the Court on June 22, 1998, on Defendant's Motion to Compel Plaintiff's Physical Examination (17), which motion was considered by the Court on the record submitted by the parties and on the basis of oral argument by counsel for the parties.

With regard to the motion, IT IS HEREBY ORDERED as follows:

1. Defendant's Motion to Compel an examination by Dr. Stephen Fuller on July 15, 1998, in Lake Oswego, Oregon, is denied.

2. Plaintiff shall submit to an ORCP 44 examination by a physician of Defendant's choice, upon reasonable notice, in Lane County, on or before September 4, 1998, excluding the time period during which she will be out of state.

3. Plaintiff may tape record the conversation that occurs during the course of the examination if she so desires.

4. No attorney fees are awarded.

DATED this 22nd day of June, 1998.

/S/ JACK MATTISON

JACK MATTISON
CIRCUIT JUDGE

Reporter; Eileen McCornack

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

PATTI L. THERIAULT,

Plaintiff(s),

vs.

SHOPKO STORES, INC., a foreign corporation; and DIVERSIFIED PRODUCTS CORPORATION, a foreign corporation,

Defendant(s).

Case No. 16-92-02481

O R D E R

THIS CAME before the Court on Defendant Diversified Products Corporation's Motion for Order Compelling Independent Medical Examination (24), which motion was considered by the Court on the record submitted by the parties.

IT IS HEREBY ORDERED that Defendant's motion that Plaintiff be compelled to submit to an independent medical examination by Dr. Stephen Fuller, M.D., in Lake Oswego, Oregon, is denied.

DATED this 5th day of February, 1993.

Jack Mattison

JACK MATTISON
PRESIDING JUDGE

EXHIBIT C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

PATTI L. THERIAULT,

Plaintiff(s),

vs.

SHOPKO STORES, INC., a foreign corporation; and DIVERSIFIED PRODUCTS CORPORATION, a foreign corporation,

Defendant(s).

Case No. 16-92-02481

O R D E R

THIS CAME before the Court on Defendant Diversified Products Corporation's Motion for Order Compelling Independent Medical Examination (24), which motion was considered by the Court on the record submitted by the parties.

IT IS HEREBY ORDERED that Defendant's motion that Plaintiff be compelled to submit to an independent medical examination by Dr. Stephen Fuller, M.D., in Lake Oswego, Oregon, is denied.

DATED this 5th day of February, 1993.

Jack Mattison

JACK MATTISON
PRESIDING JUDGE

Oregon Trial Lawyers Association
Letter to Judge Janice R. Wilson
January 19, 2000

Enclosure 6:

Advertisement, Columbia Medical Consultants, Inc.

COLUMBIA MEDICAL CONSULTANTS, INC.

Columbia Medical Consultants, Inc. has taken a whole new approach to the way Independent Medical Exams are currently being conducted. Frankly, we don't believe there should be anything ***"Independent"*** about an Independent Medical Examination.

We recognize the need for objective opinions and consultations concerning both compensability and treatment decision, but firmly believe that an increased level of communication between all parties involved will lead to a higher quality of medical care, which is the primary goal of **Columbia Medical Consultants, Inc.**

After every review or evaluation, *a phone call is made to the adjuster from the examining physician* before a report is generated to discuss specific questions or other issues raised during the evaluation process.

Just some of the professional services you would expect at CMC, Inc.:

- 6 day turn around on all reports and exams
- highest quality physicians
- multi-locations statewide
- report addendum's at no charge

Our guarantee to you is a dictated report in 6 working days or you pay only 1/2 of the examination fee.

1-800-471-5334

503-231-5334 • Fax: 503-231-1753

Convention Plaza • 123 NE 3rd Avenue • Suite 215
Portland, Oregon 97232

MARCUS
MOTION PANEL

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mas D'Amore'
ne J. Brown
la Weimar

R. Ashworth,
ounse'

January 19, 2000

Honorable Janice R. Wilson
Circuit Court of the State of Oregon
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, OR 97204

RE: Input from OTLA related to ORCP 44 Examinations

Dear Judge Wilson:

Per your request, enclosed please find Exhibits A-E, which are the attachments to the Declaration of Bradford J. Fulton.

Very truly yours,
D'AMORE & ASSOCIATES, P.C.

Thomas D'Amore

TDD/acj

☒Enclosures

cc: Linda Eyerman

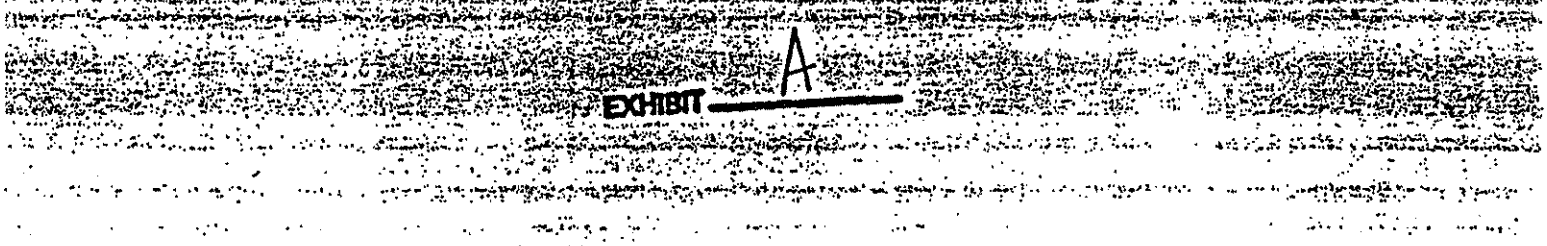
EXHIBIT A

BRADFORD J. FULTON
Background Profile

Bradford J. Fulton
Fulton & Tuttle
705 Second Avenue
10th Floor, Hoge Building
Seattle, Washington 98104
(206) 682-8813/(206) 624-0273 (fax)

EDUCATION

- Washington State University (1985): B.A. - Criminal Justice; cum laude
- University of Washington School of Law (1988); Juris Doctor

LAW PRACTICE

- 3/93 - Present: **Fulton & Tuttle** (partner)

  Private practice of law representing injured people, specializing in high-risk litigation, to include automobile personal injury, medical negligence, premises liability and drug and general product liability claims.

- 2/90-2/93: **Sullivan, Golden, Fulton** (partner and associate)

  Private practice of law representing injured people, with emphasis on high-risk contingency fee litigation.

- 6/88 - 2/90: **Helsell, Fetterman, Martin, Todd & Hokanson** (associate)

  Private practice emphasizing insurance defense and general civil practice.

- 6/87 - 3/88: **Rule 9 Legal Intern, Seattle City Attorney's Office**

  Prosecutor, Seattle Municipal Court, prosecuted various misdemeanors.

BAR ASSOCIATION MEMBERSHIPS

- Washington State Bar Association (#18036)
- Washington State Trial Lawyers Association (WSTLA)
- Association of Trial Lawyers of America (ATLA)
- Trial Lawyers for Public Justice (TLPJ)

ADMISSION TO PRACTICE

Mr. Fulton is admitted to practice before the following courts:

- Washington State Supreme Court (1988)
- United States District Court, Western District (1989)
- United States Federal District Court, Eastern District (1990)
- United States Court of Appeals (Ninth Circuit) (1990)
- United States Supreme Court (1995)

ACTIVITIES, OFFICES AND AWARDS

- Martindale-Hubbell – AV rating (highest rating) from peers (June, 1998)
- Washington State Trial Lawyers Association – Board of Governors (1995-Present)
- Phi Beta Kappa Honor Society (1985)
- Phi Kappa Phi Honor Society (1985)
- Outstanding Criminal Justice Student (Wash. State Univ.; 1985)
- Sigma Chi Fraternity (1982-1985; Life Loyal Sig)
- ATLA Moot Court Competition Finalist (1988)
- Trial Lawyers for Public Justice (TLPJ), Washington State Committee (Founder, Executive Committee)(1995)
- Trial Lawyers for Public Justice (TLPJ), Washington State Committee (Case Selection Committee Chair, 1995-1998)
- WSTLA Eagle Contributor (1992-present)
- WSTLA Heath Care Access Task Force (1993)
- WSTLA Holly Ball Silent Auction Chair (1993)
- WSTLA 1995 Annual Convention Chair (Whistler, B.C.; 1995)
- WSTLA - Development Committee (1995)
- WSTLA - CLE Committee (1996-1998)
- WSTLA - 2nd V.P. CLE (1996)
- WSTLA – Vice President - CLE (1997)
- WSTLA – 2nd V.P. - Membership (1998)
- WSTLA Membership Committee (1998)
- WSTLA University of Washington Expert Witness Policy Task Force (1998-1999)
- Qualified King County Superior Court, Guardian ad Litem Registry (1997-Present)
- Served as Guardian ad Litem/Settlement Guardian ad Litem for numerous injured minor children in both Washington State and Federal Court.

SEMINARS AND PUBLICATIONS

- Co-Editor; Two Volume WSTLA Automobile Litigation Deskbook, scheduled for publication in 1999.

- Author; WSTLA Automobile Accident Litigation Deskbook, Volume I, Chapter 10, "Contacting the Insurance Carriers: The Basics" (1999)
- Author, WSTLA Automobile Accident Litigation Deskbook, Volume II, Chapter 14(a), "General Duty to Use Reasonable Care" (1999)
- Author, WSTLA Automobile Accident Litigation Deskbook, Volume II, Chapter 14(b), "Rear-end Accidents" (1999)
- Co-Author/Editor: "Plaintiff's Perspective" section of Personal Injury chapter in KCBA's Washington Lawyers Practice Manual.(1996-1997)
- "Preemption of State Tort Law Claims by Federal Law"
  October 2, 1992; WSTLA Tort Law Update
  Seattle Convention & Trade Center (Seattle)
- "Handling Insurance Claims Arising from Automobile Collisions: What to do First"
  October 6, 1994; WSTLA Insurance Law Basics
- 1995 Annual Meeting & Convention – Convention Chair
  August 3-6, 1995
  Whistler Resort, Whistler Village, Canada
- Medicine for Lawyers Seminar Chair
  October 4, 1997
  Washington State Convention Center (Seattle)
- "Law Office Management: Maximizing the Use of Your Time"
  December 20, 1996; WSTLA Making the Most of What You Got
  Sea-Tac Red Lion Hotel (Sea-Tac)
- "Mandatory Arbitration: Is it Ethical to 'Hold Back'"
  February 28, 1997, WSTLA Cost Effective Litigation
  Sea-Tac Red Lion Hotel (Sea-Tac)
- "Putting Your Best Foot Forward: Strategies for Managing and Litigating the Exclusively Chiropractic Case"
  March 12, 1998; WSTLA Lost in the MIST of LIST - Part II
  Washington State Convention & Trade Center (Seattle)
- "Subrogation: After Mahler/Fisher"
  November 19, 1998, WSTLA
  Telephonic CLE Seminar presenter
- "How to Hammer Allstate" Seminar Chair and Speaker
  February 18, 1999
  Landmark Hotel, Tacoma

SIGNIFICANT CASES

1. Daneker v. Burroughs Wellcome (U.S. Dist. Ct. - Tacoma)
   One of plaintiff's counsel in wrongful death action arising out of Sudafed capsule cyanide tamperings (1992). Confidential settlement.

2. Addison v. Mathis, et al. (Yakima County)
   Wrongful death action arising out of automobile/semi-tractor accident. $400,000(+) settlement (1992-1993).
3. Mohler v. Comer and Schneider (King County)
   Personal injury action arising out of nearly head-on collision. Closed head injuries/seizures. $285,000 settlement (1993).
4. Nelson v. Mini-Truck Away, et al. (Lewis County)
   Personal injury action arising out of freeway auto/semi-truck accident. $295,000 settlement (1994).
5. Battles v. Eng (King County)
   Personal injury action arising out of 3 1/2 year old child's fall from defective second story window. Brain injuries. Confidential settlement (1994).
6. Swindle v. Skagit County (Skagit County)
   Medical malpractice action arising from county nurse practitioner's failure to diagnose hip dysplasia in timely manner. Confidential settlement (1992).
7. Tuttle v. Subaru of America/Hollar (Mason County)
   Products liability and auto accident claim arising from "seat belt" injuries suffered by 13 year old in one-car accident. Confidential settlement (1995).
8. Anderson v. Taylor (King County) $125,000 pre-trial settlement. Motor vehicle accident; disputed liability; disc bulge in professional violinist.
9. Lori and Robert Smith v. State Farm Mutual (Pierce County)
   Uninsured motorist (UIM) arbitration award of $112,127.35. Rear-end collision; minimal property damage; issue regarding segregation of damages between two impacts. March 9, 1995.
10. Miller v. Oak Harbor School District (2/2/94)
    $125,000 settlement with school district arising out of injuries suffered by a student while being transported to special education classes.
11. Coyne v. Hughes (King County; 9/95)
    $130,000 settlement; elderly client injured in near head-on collision.
12. Stallman v. Hoagland (Spokane County; 5/95)
    $150,000 settlement (policy third-party and UIM limits) arising from a pedestrian-auto accident occurring in Spokane County in mid-January of 1995. Fractured leg.
13. Riley v. Beck (King County; 9/95)
    $78,387.87 settlement in low speed rear-end collision case. Shoulder surgery.
14. Artley v. Zimmerman/USAA (King County)
    Disc surgery case resulting in payment of all available PIP, third-party and UIM proceeds ($120,000). January and May of 1995. King County Cause No: 95-2-31593-3.
15. DiGrazia v. Dodge/Safeco (King County)
    Disc surgery case arising out of 4/14/95 auto accident. $200,000 combined third-party and UIM settlement. June of 1996.
16. Banks v. Bauer (King County)
    $135,000 pre-trial settlement. Motor vehicle accident; ruptured thoracic disc; surgery. December of 1996.

17. Toth v. State Farm Mutual (UIM - King County)
$130,000(+) arbitration award against State Farm in an automobile accident case. January, 1998.

18. Hurlburt v. Allstate (UIM – King County)
$120,000(+) total value settlement ($100,000 policy limits, plus PIP waiver) in uninsured motorist case. Client suffered inner ear injuries (perilymph fistula, vertigo and vestibular problems) following "T-bone" accident. March, 1998.

19. Gillihan v. Gillihan (Clallam County)
$150,000 settlement for two adult daughters in wrongful death of father caused by negligence of their mother (July, 1998).

EXHIBIT B

CR-103 (4/25/96)

Insurance Commissioner's Office

X Permanent Rule
☐ Emergency Rule
☐ Expedited Repeal

)ption: June 4, 1997

urpose: To establish minimum standards for the termination, limitation, or denial of personal injury :ction (PIP) claims review in automobile liability insurance policies; and to establish the minimum stand IP arbitration clauses.

Insurance Commissioner Matter No. R 96-6

itation of existing rules affected by this order:
Repealed: None
Amended: None
Suspended: None

tatutory authority for adoption:
)ther authority: RCW 48.02.060, 48.22.105, 48.30.010

MANENT RULE ONLY
.dopted under notice filed as WSR 97-11-010 on May 9, 1997 (date).
)escribe any changes other than editing from proposed to adopted version: Continued on back...

:RGENCY RULE ONLY
Jnder RCW 34.05.350 the agency for good cause finds:
(a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to mment upon adoption of a permanent rule would be contrary to the public interest.
☐ (b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

'EDITED REPEAL ONLY
'nder Prepropoal Statement of Inquiry filed as WSR _____ on _____ (date).

Any other findings required by other provisions of law as precondition to adoption of effectiveness of rules?
☐ Yes X No . If Yes, explain:

ffective date of rule:
ermanent Rules Emergency Rules
r Expedited Repeal
days after filing ☐ Immediately
:her (specify)____* ☐ Later(specify)_____
:ss than 31 days after filing, specific finding in 5.3
RCW 34.05.380(3) is required)

(TYPE OF PRINT)
g J. Scully

E

ef Deputy Insurance Commissioner

DATE
6/4/97

Code Reviser use only

CODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED

5 1997

TIME 9:36 AM PM
WSR 97-13-005

cribe any changes other than editing from proposed to adopted version:

requirements that an insurer provide for a reconsideration or appeal of a limitation of PIP benefits was not ted.

nsurer reviews the treatment of multiple health care professionals, the review shall be competed by a fessional with the same license as the principal prescribing or diagnosing provider.

en providing a written limitation of benefits the insurer shall provide the insured with copies of pertinent uments, if requested by the insured.

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

number of sections adopted in order to comply with:

Federal statute:	New __0___	Amended __0___	Repealed __0___
Federal rules or standards:	New __0___	Amended __0___	Repealed __0___
Recently enacted* state statutes:	New __0___	Amended __0___	Repealed __0___

(Current calendar year)

number of sections adopted at the request of among governmental entity:

New __0___ Amended __0___ Repealed __0___

number of sections adopted on the agency's own initiative:

New __1___ Amended __0___ Repealed __0___

number of sections adopted in order to clarify, streamline, or reform agency procedures:

New __0___ Amended __0___ Repealed __0___

mber of sections adopted using:

Negotiated rule making:	New __0___	Amended __0___	Repealed __0___
Pilot rule making:	New __0___	Amended __0___	Repealed __0___

NEW SECTION

WAC 284-30-395 Standards for prompt, fair and equitable :lements applicable to automobile personal injury protection nsurance. The commissioner finds that some insurers limit, terminate, or deny coverage for personal injury protection insurance without adequate disclosure to insureds of their bases for such actions. To eliminate unfair acts or practices in accord with RCW 48.30.010, the following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance specifically applicable to automobile personal injury protection insurance. The following standards apply to an insurer's consultation with health care professionals when reviewing the reasonableness or necessity of treatment of the insured claiming benefits under his or her automobile personal injury protection benefits in an automobile insurance policy, as those terms are defined in RCW 48.22.005 (1), (7), and (8), and as prescribed at RCW 48.22.085 through 48.22.100. This section applies only where the insurer relies on the medical opinion of health care professionals to deny, limit, or terminate medical and hospital benefit claims. When used in this section, the term "medical or health care professional" does not include an insurer's claim representatives, adjusters, or managers or any health care professional in the direct employ of the insurer.

(1) Within a reasonable time after receipt of actual notice of an insured's intent to file a personal injury protection medical and hospital benefits claim, and in every case prior to denying,]'miting, or terminating an insured's medical and hospital ,enefits, an insurer shall provide an insured with a written explanation of the coverage provided by the policy, including a notice that the insurer may deny, limit, or terminate benefits if the insurer determines that the medical and hospital services:

(a) Are not reasonable;

(b) Are not necessary;

(c) Are not related to the accident; or

(d) Are not incurred within three years of the automobile accident.

These are the only grounds for denial, limitation, or termination of medical and hospital services permitted pursuant to RCW 48.22.005(7), 48.22.095, or 48.22.100.

(2) Within a reasonable time after an insurer concludes that it intends to deny, limit, or terminate an insured's medical and hospital benefits, the insurer shall provide an insured with a written explanation that describes the reasons for its action and copies of pertinent documents, if any, upon request of the insured. The insurer shall include the true and actual reason for its action as provided to the insurer by the medical or health care professional with whom the insurer consulted in clear and simple language, so that the insured will not need to resort to additional research to understand the reason for the action. A simple statement, for example, that the services are "not reasonable or necessary" is insufficient.

consult regarding its decision to deny, limit, or terminate an insured's medical and hospital benefits shall be currently licensed, certified, or registered to practice in the same health field or specialty as the health care professional that treated the insured.

(b) If the insured is being treated by more than one health care professional, the review shall be completed by a professional licensed, certified, or registered to practice in the same health field or specialty as the principal prescribing or diagnosing provider, unless otherwise agreed to by the insured and the insurer. This does not prohibit the insurer from providing additional reviews of other categories of professionals.

(4) To assist in any examination by the commissioner or the commissioner's delegatee, the insurer shall maintain in the insured's claim file sufficient information to verify the credentials of the health care professional with whom it consulted.

(5) An insurer shall not refuse to pay expenses related to a covered property damage loss arising out of an automobile accident solely because an insured failed to attend, or chose not to participate in, an independent medical examination requested under the insured's personal injury protection coverage.

(6) If an automobile liability insurance policy includes an arbitration provision, it shall conform to the following standards:

(a) The arbitration shall commence within a reasonable period of time after it is requested by an insured.

(b) The arbitration shall take place in the county in which the insured resides or the county where the insured resided at the time of the accident, unless the parties agree to another location.

(c) Relaxed rules of evidence shall apply, unless other rules of evidence are agreed to by the parties.

(d) The arbitration shall be conducted pursuant to arbitration rules similar to those of the American Arbitration Association, the Center for Public Resources, the Judicial Arbitration and Mediation Service, Washington Arbitration and Mediation Service, chapter 7.04 RCW, or any other rules of arbitration agreed to by the parties.

EXHIBIT C

FULTON & TUTTLE

Attorneys at Law

Bradford J. Fulton Jeffrey B. Tuttle

October 14, 1998

[redacted], Claims Supervisor
Farmers Insurance Company
P.O. Box 55609
Seattle, WA 98155

FILE COPY

Re: Our Client: [redacted]
Your Insured: [redacted]
Date of Loss: August 31, 1997
Your Claim No: 13 125348

Dear Mr. Hanes:

This will acknowledge receipt of your letter dated October 1, 1998 (received October 5, 1998) wherein Farmers demands a PIP termination exam before it will pay any more medical expenses relating to Mr. [redacted]. While I find it interesting that Farmers has now decided to demand a PIP termination examination only (and immediately) after Mr. [redacted] decided to retain legal counsel, I will address the matters raised in your letter.

First, please be advised that we will make Mr. [redacted] available for the requested PIP termination examination. I will contact Mr. [redacted] and obtain convenient dates and times for the examination. Hopefully, I will be able to contact Mr. Rooks by early next week and get dates to you.

However, to avoid any misunderstanding at the time of your proposed PIP termination examination, I am writing to let you know well in advance the following:

1. I reserve the right to attend the examination with Mr. [redacted], or have someone from my office do so;
2. I will record the examination via dictaphone, as allowed pursuant to CR 35(a);
3. Mr. [redacted] will submit to all requested examinations (within reason), but will not, as this is not an examination for purposes of receiving medical treatment, fill out any pain diagrams, medical history forms, or other such forms, or secure or bring with him any x-rays or records;
4. I would expect you to provide the PIP termination doctor(s) with whatever records, medical, billing or otherwise, you feel he/she may require in advance of the examination, something which will avoid the need for a

705 Second Avenue • 10th Floor • Hoge Building • Seattle, Washington 98104
Telephone: (206) 682-8813 • Facsimile: (206) 624-0273
E-mail: fultut@msn.com • Pager: (206) 918-7030

lengthy interview at the time of the examination. You have previously been provided with the required PIP medical authorization allowing you to order all relevant records and bills to provide to the PIP termination physician(s). Too often, examining physicians are provided with unorganized records and information which they attempt to review during the course of the PIP termination exam, something which unreasonably lengthens the time required for the examination and unnecessarily inconveniences your insured. As such, I trust that whatever records and bills are provided to the physician(s) will be provided in an organized and useable fashion to avoid such an occurrence in this instance;

5. I will need written confirmation from you prior to the date of this examination that **all** of Mr. [redacted] outstanding medical specials have been processed **through the date of the PIP termination examination**, i.e., your arbitrary October 1, 1998 date is unacceptable; and
6. I would ask that I immediately be provided with a copy of the examining physician's curriculum vitae so that I may ensure that this examination meets with the new PIP medical exam requirements contained in the Washington Administrative Code.

Finally, I would request that you send a copy of this letter to your PIP termination evaluator(s) well in advance of the examination so that none of these conditions come as a surprise to him/her at the time of the PIP termination examination. You doing this will avoid a potentially uncomfortable situation for all involved.

Sincerely,

Bradford J. Fulton

BJF:lq

cc: [redacted] (w/enc)

EXHIBIT D

MEDICAL EVALUATIONS

TO: PEMCO Mutual Insurance Company
P.O. Box 97009
Lynnwood, WA 98046-9709

ATTENTION: [redacted]
Lynnwood Claims Department
1-800-552-7440, Extension 7738

RE: [redacted]
C/O Bradford J. Fulton, Attorney at Law
705 Second Avenue
10th Floor, Hoge Building
Seattle, WA 98104

Claim #: CA 0670198
DOI : 12-01-97
DOI : 02-02-98
DOB : 12-12-43

DATE OF EVALUATION: May 4, 1999

LOCATION OF EVALUATION: Mountlake Terrace Clinic

EXAMINER(s): Margaret L. Moen, M.D., Neurologist

The following is NHR/Haelan's report of Independent Medical Evaluation regarding [redacted]. The claimant was informed that this evaluation was at the request of PEMCO Mutual Insurance Company and that a written report would be sent to that agency. Furthermore, the claimant was informed that the purpose of the evaluation was to address specific injuries and/or conditions as outlined by the requesting agency and was not meant to constitute a general medical examination or substitute for his/her personal health care provider(s).

The opinions expressed in this report are those of the examiner(s) and do not reflect the opinions of NHR/Haelan.

We appreciate the opportunity to be of service to you and hope this information will be beneficial in determining the disposition of this claim. Thank you for this referral; and if you have any questions regarding this information, please contact our Quality Assurance Department.

RECORD REVIEW: The available records have been reviewed in detail and all pertinent data incorporated into this report.

The claimant is being seen in the presence of his attorney. He has been requested to be seen by PEMCO Mutual Insurance Company. He is seen in regards to automobile accidents of December 1, 1997, and January 2, 1998.

CHIEF COMPLAINT(s): Pain at the base of the skull; low back pain; head shaking; neck pain.

HISTORY OF CURRENT INJURY: The claimant is a 55-year-old male who was involved in the first motor vehicle accident on December 1, 1997. He had stopped at a light and had turned. He was then proceeding through the light when his vehicle was hit on the passenger rear quarter panel by another driver coming out of a gas station. The claimant was driving a Ford Taurus and was restrained at the time. He did not strike his head. He did note some numb sensation in the neck area after the automobile accident. He recalls his neck stiffening up while he was waiting in his car for the police to show up. He describes it more as a pressure and pain sensation than a stiffening.

He did not see a health practitioner that day. He believes he went to see Jerry Wickman, D.C., ıe following day. He had been following with Dr. Wickman prior to this automobile accident. He believes it had been several months since he had last seen his chiropractor. His chiropractor began a course of adjustments once he saw him, and then referred him on to physical therapy at Healthsouth Physical Therapy.

The claimant was seen in physical therapy on December 4, 1997. At that time, he was complaining of some neck and upper thoracic pain. They diagnosed segmental myofascial dysfunction. He does feel he received benefit from his course of physical therapy as well as from his chiropractic treatment. He did undergo physical therapy approximately one to two times a week.

He was seen by Gregory M. Engel, M.D., orthopedic surgeon, at Bellevue Bone and Joint on December 18, 1997. Dr. Engel noted his history of having been broadsided by another car and did note an aggravation of elbow problems. He also noted that the claimant had a neck strain, and the claimant recalls he was having some lumbar discomfort as well. Dr. Engel also noted some lumbar strain with this. Dr. Engel did not note any specific findings on examination at that time.

EXHIBIT E

WASHINGTON COURT RULES

STATE

1999

WEST GROUP

ty. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; September 1, 1997.]

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the 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. The party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination. Unless otherwise ordered by the court, the party or the party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. 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 that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

[Amended effective July 1, 1972; September 17, 1993.]

RULE 36. REQUESTS FOR ADMISSION

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. Requests

MARCUS

RCVD IN CHAMBERS

FEB 02 2000

JUDGE JANICE WILSON

COSGRAVE, VERGEER & KESTER LLP
Attorneys at Law
Bank of America Financial Center
Suite 1300 • 121 SW Morrison • Portland, Oregon 97204-3193
Tel: (503) 323-9000 • Fax: (503) 323-9019

Eugene H. Buckle

February 2, 2000

VIA HAND DELIVERY

The Honorable Janice R. Wilson
Circuit Court Judge
Multnomah County Courthouse
1021 SW 4th Avenue
Portland, Oregon 97204

RE: Motion Panel Advisory Rulings Related to ORCP 44 Examinations

Dear Judge Wilson:

I am writing in support of the current Motion Panel Advisory Rulings on this issue. I might note that in your December 16, 1999 letter to Linda Eyerman and Chrys Martin, you referenced a "Practice Tip" article in the Fall OADC publication. I authored that article.

The concern I have and I believe that other trial lawyers have is protecting the process. By that I mean, in civil personal injury cases where the defense is entitled to a defense medical examination, it has always been difficult to obtain competent doctors in various specialties who are willing to subject themselves to the rigors of cross-examination filled with innuendo about how "biased" they must be for being willing to participate in the process on a repeated basis. I have had doctors tell me that they feel an ethical obligation under their Hippocratic oath to provide a second medical opinion (it is no longer in vogue to call it an "independent" medical opinion) regarding the injuries of someone who is seeking compensation in our legal system.

The actual physical examination of an individual by a doctor is and should remain private. It is a medical exam, not a legal (e.g., deposition) examination. Invasion of this traditional privacy between an examining doctor and an individual would invade the province of the medical exam, and would further erode, I believe, the willingness of doctors to participate in the judicial system in these cases.

Another issue is one of equity. If a defense medical exam is allowed to be recorded or a representative of the plaintiff is allowed to be present, then shouldn't the defense be

allowed to record or have someone present at an examination of plaintiff performed by a treating doctor just prior to trial mainly for the purpose of preparing the treating doctor for his/her trial testimony? In fact, I just had a case before Judge Ceniceros in which plaintiff's attorney had an "IME" of his client by an orthopedic doctor who was the testifying doctor at trial. Surely, in that situation, I would have been entitled to record that exam or be present myself if the current motion panel advisory ruling on ORCP 44 exams is altered.

It just seems to me that plaintiffs' attorneys have sufficient data from other sources to cross-examine a defense doctor (number of times he/she testifies, the amount of money he/she makes doing IMEs, the number of times he/she has testified for the defense lawyer, etc.), that there is no burning need to invade the physician/plaintiff defense medical examination on the front end. What "wrong" is now being committed in those exams which violates what fundamental right of the plaintiff such that there is a need to change the current system? Any proposed change to the current ruling would be of even more concern in a defense psychological exam (e.g., having someone else present, having it recorded, etc.).

Thank you for your consideration of this matter. I apologize for getting this to you at this late date.

Very truly yours,

COSGRAVE, VERGEER & KESTER LLP

Eugene H. Buckle

EHB:lch

MARCUS

COSGRAVE, VERGEER & KESTER LLP
Attorneys at Law
Bank of America Financial Center
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Walter H. Sweek
wsweek@cvk-law.com

February 7, 2000

VIA HAND-DELIVERY

Honorable Janice R. Wilson
MULTNOMAH COUNTY COURTHOUSE
1021 SW Fourth Avenue
Portland, OR 97204

Dear Judge Wilson:

I apologize for the tardiness but, hopefully, it can be considered by you and your February 7 meeting with the motion panel. I have read with interest the various positions that have been floating around and have talked to judges about their concerns over the current defense medical procedures.

I suggest we step back for a moment and place this controversy in context. I believe there have been attempts to politicize the defense medical situation by attorneys and, yes, even perhaps a judge or two who have their own agenda or who fail to take a balanced view of the situation.

Every trial lawyer, plaintiff or defense, knows that there are certain doctors in this area who examine and treat plaintiffs who are advocates for their clients, whose treatment and whose opinions can be anticipated in virtually every case and to whom plaintiffs (patients) can be referred for an anticipated outcome. The plaintiff attorney would have the court believe that virtually every doctor who examines and give a second opinion or a defense opinion is a mouthpiece for the defense bar who cannot be trusted to conduct an honest and medically sound examination of the patient plaintiff. Granted, on the defense side, as on the plaintiff side, there are doctors who examine regularly for the defense whose opinions are predictable. These doctors are not generally well received by the jury, and likewise, are not doctors that would be

selected by competent defense lawyers in difficult cases when the lawyer seeks most of all to have a competent second opinion, and secondly, an opinion by a doctor who is able to get on the witness stand and convey it.

I am confident that in your experience you have seen numerous examples of the scenarios that I have mentioned above. I would hate to see the trial process fall victim to the agenda of one or another group of attorneys who seek to obtain rulings from the court which validate the self-interests of those attorneys and their client groups at the expense of a fair presentation of the evidence.

Very truly yours,

COSGRAVE, VERGEER & KESTER LLP

Walter H. Sweek

WHS/jmh

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

JANICE R. WILSON
JUDGE

PHONE (503) 248-3069
FAX (503) 248-3425
OFFICE FAX: (503) 276-0968
E-MAIL: janice.r.wilson@ojd.state.or.us

March 29, 2000

Gary A. Rankin
Attorney at Law
Suite 1450
1001 SW Fifth Avenue
Portland, OR 97204

Re: Motion Panel – ORCP 44 Examinations

Dear Mr. Rankin:

Thank you for your letter of March 20, 2000, describing your concerns about changes in the way medical examinations are conducted under ORCP 44. I appreciate your taking the time to describe your experiences and your views.

As you may have heard, the Multnomah County Motion Panel has withdrawn its previous consensus statements about who may be present at such an exam and whether they may be recorded electronically. The Oregon Council on Court Procedures is looking into this issue. The Motion Panel has forwarded to the Council all of the letters we received on the subject. I am forwarding yours, as well.

Sincerely,

Janice R. Wilson

cc: Judge Michael Marcus

Gary A. Rankin

Attorney at Law
ADMITTED IN OREGON AND WASHINGTON
Staff Counsel, Allstate Insurance Company
1001 SW Fifth Avenue, Suite 1450
Portland, Oregon 97204

(503) 223-9110x101 FAX (503) 223-9116

March 20, 2000

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

RE: Motion Panel - Defense Examinations

Dear Judge Wilson:

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

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

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

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

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

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

Very Truly Yours,

GARY A. RANKIN
Attorney at Law

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

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

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

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

[redacted]

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

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

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

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

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

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

February 24, 2000

DISCUSSION:

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

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

No further comments can be made at this time.

Respectfully submitted,

COSGRAVE, VERGEER & KESTER LLP
Attorneys at Law
Bank of America Financial Center
Suite 1300 • 121 SW Morrison • Portland, Oregon 97204-3193
Tel: (503) 323-9000 • Fax: (503) 323-9019

Buckle

February 2, 2000

AND DELIVERY

norable Janice R. Wilson
Court Judge
nah County Courthouse
W 4th Avenue
nd, Oregon 97204

RE: Motion Panel Advisory Rulings Related to ORCP 44 Examinations

Judge Wilson:

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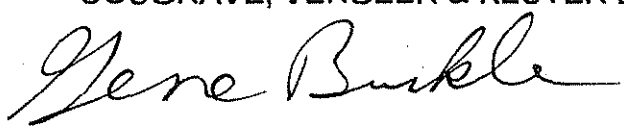
Thank you for your consideration of this matter. I apologize for getting this to you at this late date.

Very truly yours,

COSGRAVE, VERGEER & KESTER LLP



Eugene H. Buckle

EHB:lch

MARCUS

COSGRAVE, VERGEER & KESTER LLP
Attorneys at Law
Bank of America Financial Center
Suite 1300 ▪ 121 SW Morrison ▪ Portland, Oregon 97204-3193
Tel: (503) 323-9000 ▪ Fax: (503) 323-9019

Walter H. Sweek
wsweek@cvk-law.com

February 7, 2000

VIA HAND-DELIVERY

Honorable Janice R. Wilson
MULTNOMAH COUNTY COURTHOUSE
1021 SW Fourth Avenue
Portland, OR 97204

Dear Judge Wilson:

I apologize for the tardiness but, hopefully, it can be considered by you and your February 7 meeting with the motion panel. I have read with interest the various positions that have been floating around and have talked to judges about their concerns over the current defense medical procedures.

I suggest we step back for a moment and place this controversy in context. I believe there have been attempts to politicize the defense medical situation by attorneys and, yes, even perhaps a judge or two who have their own agenda or who fail to take a balanced view of the situation.

Every trial lawyer, plaintiff or defense, knows that there are certain doctors in this area who examine and treat plaintiffs who are advocates for their clients, whose treatment and whose opinions can be anticipated in virtually every case and to whom plaintiffs (patients) can be referred for an anticipated outcome. The plaintiff attorney would have the court believe that virtually every doctor who examines and give a second opinion or a defense opinion is a mouthpiece for the defense bar who cannot be trusted to conduct an honest and medically sound examination of the patient plaintiff. Granted, on the defense side, as on the plaintiff side, there are doctors who examine regularly for the defense whose opinions are predictable. These doctors are not generally well received by the jury, and likewise, are not doctors that would be

selected by competent defense lawyers in difficult cases when the lawyer seeks most of all to have a competent second opinion, and secondly, an opinion by a doctor who is able to get on the witness stand and convey it.

I am confident that in your experience you have seen numerous examples of the scenarios that I have mentioned above. I would hate to see the trial process fall victim to the agenda of one or another group of attorneys who seek to obtain rulings from the court which validate the self-interests of those attorneys and their client groups at the expense of a fair presentation of the evidence.

Very truly yours,

COSGRAVE, VERGEER & KESTER LLP

WHS/jmh

Walter H. Sweek

MARCUS
MOTION PANEL

D'AMORE & ASSOCIATES
Trial Lawyers

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omas D'Amore
ine J. Brown
da Weimar

R. Ashworth,
Counsel

January 19, 2000

Honorable Janice R. Wilson
Circuit Court of the State of Oregon
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, OR 97204

RE: Input from OTLA related to ORCP 44 Examinations

Dear Judge Wilson:

Per your request, enclosed please find Exhibits A-E, which are the attachments to the Declaration of Bradford J. Fulton.

Very truly yours,
D'AMORE & ASSOCIATES, P.C.

Thomas D'Amore

TDD/acj

☒Enclosures

cc: Linda Eyerman

EXHIBIT A

BRADFORD J. FULTON
Background Profile

Bradford J. Fulton
Fulton & Tuttle
705 Second Avenue
10th Floor, Hoge Building
Seattle, Washington 98104
(206) 682-8813/(206) 624-0273 (fax)

EDUCATION

- Washington State University (1985): B.A. - Criminal Justice; cum laude
- University of Washington School of Law (1988); Juris Doctor

LAW PRACTICE

- 3/93 - Present: **Fulton & Tuttle** (partner)

  Private practice of law representing injured people, specializing in high-risk litigation, to include automobile personal injury, medical negligence, premises liability and drug and general product liability claims.

- 2/90-2/93: **Sullivan, Golden, Fulton** (partner and associate)

  Private practice of law representing injured people, with emphasis on high-risk contingency fee litigation.

- 6/88 - 2/90: **Helsell, Fetterman, Martin, Todd & Hokanson** (associate)

  Private practice emphasizing insurance defense and general civil practice.

- 6/87 - 3/88: **Rule 9 Legal Intern, Seattle City Attorney's Office**

  Prosecutor, Seattle Municipal Court, prosecuted various misdemeanors.

BAR ASSOCIATION MEMBERSHIPS

- Washington State Bar Association (#18036)
- Washington State Trial Lawyers Association (WSTLA)
- Association of Trial Lawyers of America (ATLA)
- Trial Lawyers for Public Justice (TLPJ)

ADMISSION TO PRACTICE

Mr. Fulton is admitted to practice before the following courts:

- Washington State Supreme Court (1988)
- United States District Court, Western District (1989)
- United States Federal District Court, Eastern District (1990)
- United States Court of Appeals (Ninth Circuit) (1990)
- United States Supreme Court (1995)

ACTIVITIES, OFFICES AND AWARDS

- Martindale-Hubbell – AV rating (highest rating) from peers (June, 1998)
- Washington State Trial Lawyers Association – Board of Governors (1995-Present)
- Phi Beta Kappa Honor Society (1985)
- Phi Kappa Phi Honor Society (1985)
- Outstanding Criminal Justice Student (Wash. State Univ.; 1985)
- Sigma Chi Fraternity (1982-1985; Life Loyal Sig)
- ATLA Moot Court Competition Finalist (1988)
- Trial Lawyers for Public Justice (TLPJ), Washington State Committee (Founder, Executive Committee)(1995)
- Trial Lawyers for Public Justice (TLPJ), Washington State Committee (Case Selection Committee Chair, 1995-1998)
- WSTLA Eagle Contributor (1992-present)
- WSTLA Heath Care Access Task Force (1993)
- WSTLA Holly Ball Silent Auction Chair (1993)
- WSTLA 1995 Annual Convention Chair (Whistler, B.C.; 1995)
- WSTLA - Development Committee (1995)
- WSTLA - CLE Committee (1996-1998)
- WSTLA - 2nd V.P. CLE (1996)
- WSTLA – Vice President - CLE (1997)
- WSTLA – 2nd V.P. - Membership (1998)
- WSTLA Membership Committee (1998)
- WSTLA University of Washington Expert Witness Policy Task Force (1998-1999)
- Qualified King County Superior Court, Guardian ad Litem Registry (1997-Present)
- Served as Guardian ad Litem/Settlement Guardian ad Litem for numerous injured minor children in both Washington State and Federal Court.

SEMINARS AND PUBLICATIONS

- Co-Editor; Two Volume WSTLA Automobile Litigation Deskbook, scheduled for publication in 1999.

- Author; WSTLA Automobile Accident Litigation Deskbook, Volume I, Chapter 10, "Contacting the Insurance Carriers: The Basics" (1999)
- Author, WSTLA Automobile Accident Litigation Deskbook, Volume II, Chapter 14(a), "General Duty to Use Reasonable Care" (1999)
- Author, WSTLA Automobile Accident Litigation Deskbook, Volume II, Chapter 14(b), "Rear-end Accidents" (1999)
- Co-Author/Editor: "Plaintiff's Perspective" section of Personal Injury chapter in KCBA's Washington Lawyers Practice Manual.(1996-1997)
- "Preemption of State Tort Law Claims by Federal Law"
  October 2, 1992; WSTLA Tort Law Update
  Seattle Convention & Trade Center (Seattle)
- "Handling Insurance Claims Arising from Automobile Collisions: What to do First"
  October 6, 1994; WSTLA Insurance Law Basics
- 1995 Annual Meeting & Convention – Convention Chair
  August 3-6, 1995
  Whistler Resort, Whistler Village, Canada
- Medicine for Lawyers Seminar Chair
  October 4, 1997
  Washington State Convention Center (Seattle)
- "Law Office Management: Maximizing the Use of Your Time"
  December 20, 1996; WSTLA Making the Most of What You Got
  Sea-Tac Red Lion Hotel (Sea-Tac)
- "Mandatory Arbitration: Is it Ethical to 'Hold Back'"
  February 28, 1997, WSTLA Cost Effective Litigation
  Sea-Tac Red Lion Hotel (Sea-Tac)
- "Putting Your Best Foot Forward: Strategies for Managing and Litigating the Exclusively Chiropractic Case"
  March 12, 1998; WSTLA Lost in the MIST of LIST - Part II
  Washington State Convention & Trade Center (Seattle)
- "Subrogation: After Mahler/Fisher"
  November 19, 1998, WSTLA
  Telephonic CLE Seminar presenter
- "How to Hammer Allstate" Seminar Chair and Speaker
  February 18, 1999
  Landmark Hotel, Tacoma

SIGNIFICANT CASES

1. Daneker v. Burroughs Wellcome (U.S. Dist. Ct. - Tacoma)
   One of plaintiff's counsel in wrongful death action arising out of Sudafed capsule cyanide tamperings (1992). Confidential settlement.

2. Addison v. Mathis, et al. (Yakima County)
   Wrongful death action arising out of automobile/semi-tractor accident. $400,000(+) settlement (1992-1993).
3. Mohler v. Comer and Schneider (King County)
   Personal injury action arising out of nearly head-on collision. Closed head injuries/seizures. $285,000 settlement (1993).
4. Nelson v. Mini-Truck Away, et al. (Lewis County)
   Personal injury action arising out of freeway auto/semi-truck accident. $295,000 settlement (1994).
5. Battles v. Eng (King County)
   Personal injury action arising out of 3 1/2 year old child's fall from defective second story window. Brain injuries. Confidential settlement (1994).
6. Swindle v. Skagit County (Skagit County)
   Medical malpractice action arising from county nurse practitioner's failure to diagnose hip dysplasia in timely manner. Confidential settlement (1992).
7. Tuttle v. Subaru of America/Hollar (Mason County)
   Products liability and auto accident claim arising from "seat belt" injuries suffered by 13 year old in one-car accident. Confidential settlement (1995).
8. Anderson v. Taylor (King County) $125,000 pre-trial settlement. Motor vehicle accident; disputed liability; disc bulge in professional violinist.
9. Lori and Robert Smith v. State Farm Mutual (Pierce County)
   Uninsured motorist (UIM) arbitration award of $112,127.35. Rear-end collision; minimal property damage; issue regarding segregation of damages between two impacts. March 9, 1995.
10. Miller v. Oak Harbor School District (2/2/94)
    $125,000 settlement with school district arising out of injuries suffered by a student while being transported to special education classes.
11. Coyne v. Hughes (King County; 9/95)
    $130,000 settlement; elderly client injured in near head-on collision.
12. Stallman v. Hoagland (Spokane County; 5/95)
    $150,000 settlement (policy third-party and UIM limits) arising from a pedestrian-auto accident occurring in Spokane County in mid-January of 1995. Fractured leg.
13. Riley v. Beck (King County; 9/95)
    $78,387.87 settlement in low speed rear-end collision case. Shoulder surgery.
14. Artley v. Zimmerman/USAA (King County)
    Disc surgery case resulting in payment of all available PIP, third-party and UIM proceeds ($120,000). January and May of 1995. King County Cause No: 95-2-31593-3.
15. DiGrazia v. Dodge/Safeco (King County)
    Disc surgery case arising out of 4/14/95 auto accident. $200,000 combined third-party and UIM settlement. June of 1996.
16. Banks v. Bauer (King County)
    $135,000 pre-trial settlement. Motor vehicle accident; ruptured thoracic disc; surgery. December of 1996.

17. Toth v. State Farm Mutual (UIM - King County)
$130,000(+) arbitration award against State Farm in an automobile accident case. January, 1998.

18. Hurlburt v. Allstate (UIM – King County)
$120,000(+) total value settlement ($100,000 policy limits, plus PIP waiver) in uninsured motorist case. Client suffered inner ear injuries (perilymph fistula, vertigo and vestibular problems) following "T-bone" accident. March, 1998.

19. Gillihan v. Gillihan (Clallam County)
$150,000 settlement for two adult daughters in wrongful death of father caused by negligence of their mother (July, 1998).

EXHIBIT B

CR-103 (4/25/96)

Insurance Commissioner's Office

X Permanent Rule
☐ Emergency Rule
☐ Expedited Repeal

adoption: June 4, 1997

Purpose: To establish minimum standards for the termination, limitation, or denial of personal injury protection (PIP) claims review in automobile liability insurance policies; and to establish the minimum standards for PIP arbitration clauses.

Insurance Commissioner Matter No. R 96-6

Citation of existing rules affected by this order:
Repealed: None
Amended: None
Suspended: None

Statutory authority for adoption:
Other authority: RCW 48.02.060, 48.22.105, 48.30.010

PERMANENT RULE ONLY
Adopted under notice filed as WSR 97-11-010 on May 9, 1997 (date).
Describe any changes other than editing from proposed to adopted version: Continued on back...

EMERGENCY RULE ONLY
Under RCW 34.05.350 the agency for good cause finds:
(a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
(b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

EXPEDITED REPEAL ONLY
Under Preproposal Statement of Inquiry filed as WSR _____ on _____ (date).

(3) Any other findings required by other provisions of law as precondition to adoption of effectiveness of rules?
☐ Yes X No. If Yes, explain:

Effective date of rule:
Permanent Rules Emergency Rules
or Expedited Repeal
31 days after filing ☐ Immediately
Other (specify)____ ☐ Later(specify)_____
(If less than 31 days after filing, specific finding in 5.3 under RCW 34.05.380(3) is required)

NAME (TYPE OR PRINT)
Greg J. Seally

SIGNATURE

TITLE
Chief Deputy Insurance Commissioner

DATE
6/4/97

Code Reviser use only

CODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED

5 1997

TIME 9:36 AM PM

WSR 97-13-005

MANENT RULE ONLY continued...

cribe any changes other than editing from proposed to adopted version:

requirements that an insurer provide for a reconsideration or appeal of a limitation of PIP benefits was not ted.

n insurer reviews the treatment of multiple health care professionals, the review shall be competed by a fessional with the same license as the principal prescribing or diagnosing provider.

hen providing a written limitation of benefits the insurer shall provide the insured with copies of pertinent cuments, if requested by the insured.

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

e number of sections adopted in order to comply with:

Federal statute:	New __0___	Amended __0___	Repealed __0___
Federal rules or standards:	New __0___	Amended __0___	Repealed __0___
Recently enacted* state statutes:	New __0___	Amended __0___	Repealed __0___

*(Current calendar year)

e number of sections adopted at the request of among governmental entity:

New __0___ Amended __0___ Repealed __0___

e number of sections adopted on the agency's own initiative:

New __1___ Amended __0___ Repealed __0___

e number of sections adopted in order to clarify, streamline, or reform agency procedures:

New __0___ Amended __0___ Repealed __0___

e number of sections adopted using:

Negotiated rule making:	New __0___	Amended __0___	Repealed __0___
Pilot rule making:	New __0___	Amended __0___	Repealed __0___

NEW SECTION

WAC 284-30-395 Standards for prompt, fair and equitable settlements applicable to automobile personal injury protection insurance. The commissioner finds that some insurers limit, terminate, or deny coverage for personal injury protection insurance without adequate disclosure to insureds of their bases for such actions. To eliminate unfair acts or practices in accord with RCW 48.30.010, the following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance specifically applicable to automobile personal injury protection insurance. The following standards apply to an insurer's consultation with health care professionals when reviewing the reasonableness or necessity of treatment of the insured claiming benefits under his or her automobile personal injury protection benefits in an automobile insurance policy, as those terms are defined in RCW 48.22.005 (1), (7), and (8), and as prescribed at RCW 48.22.085 through 48.22.100. This section applies only where the insurer relies on the medical opinion of health care professionals to deny, limit, or terminate medical and hospital benefit claims. When used in this section, the term "medical or health care professional" does not include an insurer's claim representatives, adjusters, or managers or any health care professional in the direct employ of the insurer.

(1) Within a reasonable time after receipt of actual notice of an insured's intent to file a personal injury protection medical and hospital benefits claim, and in every case prior to denying, limiting, or terminating an insured's medical and hospital benefits, an insurer shall provide an insured with a written explanation of the coverage provided by the policy, including a notice that the insurer may deny, limit, or terminate benefits if the insurer determines that the medical and hospital services:

(a) Are not reasonable;

(b) Are not necessary;

(c) Are not related to the accident; or

(d) Are not incurred within three years of the automobile accident.

These are the only grounds for denial, limitation, or termination of medical and hospital services permitted pursuant to RCW 48.22.005(7), 48.22.095, or 48.22.100.

(2) Within a reasonable time after an insurer concludes that it intends to deny, limit, or terminate an insured's medical and hospital benefits, the insurer shall provide an insured with a written explanation that describes the reasons for its action and copies of pertinent documents, if any, upon request of the insured. The insurer shall include the true and actual reason for its action as provided to the insurer by the medical or health care professional with whom the insurer consulted in clear and simple language, so that the insured will not need to resort to additional research to understand the reason for the action. A simple statement, for example, that the services are "not reasonable or necessary" is insufficient.

(3)(a) Health care professionals with whom the insurer will consult regarding its decision to deny, limit, or terminate an insured's medical and hospital benefits shall be currently licensed, certified, or registered to practice in the same health field or specialty as the health care professional that treated the insured.

(b) If the insured is being treated by more than one health care professional, the review shall be completed by a professional licensed, certified, or registered to practice in the same health field or specialty as the principal prescribing or diagnosing provider, unless otherwise agreed to by the insured and the insurer. This does not prohibit the insurer from providing additional reviews of other categories of professionals.

(4) To assist in any examination by the commissioner or the commissioner's delegatee, the insurer shall maintain in the insured's claim file sufficient information to verify the credentials of the health care professional with whom it consulted.

(5) An insurer shall not refuse to pay expenses related to a covered property damage loss arising out of an automobile accident solely because an insured failed to attend, or chose not to participate in, an independent medical examination requested under the insured's personal injury protection coverage.

(6) If an automobile liability insurance policy includes an arbitration provision, it shall conform to the following standards:

(a) The arbitration shall commence within a reasonable period of time after it is requested by an insured.

(b) The arbitration shall take place in the county in which the insured resides or the county where the insured resided at the time of the accident, unless the parties agree to another location.

(c) Relaxed rules of evidence shall apply, unless other rules of evidence are agreed to by the parties.

(d) The arbitration shall be conducted pursuant to arbitration rules similar to those of the American Arbitration Association, the Center for Public Resources, the Judicial Arbitration and Mediation Service, Washington Arbitration and Mediation Service, chapter 7.04 RCW, or any other rules of arbitration agreed to by the parties.

EXHIBIT C

FULTON FT TUTTLE

Attorneys at Law

Bradford J. Fulton Jeffrey B. Tuttle

October 14, 1998

[redacted], Claims Supervisor
Farmers Insurance Company
P.O. Box 55609
Seattle, WA 98155

FILE COPY

Re: Our Client: [redacted]
Your Insured: [redacted]
Date of Loss: August 31, 1997
Your Claim No: 13 125348

Dear Mr. Hanes:

This will acknowledge receipt of your letter dated October 1, 1998 (received October 5, 1998) wherein Farmers demands a PIP termination exam before it will pay any more medical expenses relating to Mr. [redacted]. While I find it interesting that Farmers has now decided to demand a PIP termination examination only (and immediately) after Mr. [redacted] decided to retain legal counsel, I will address the matters raised in your letter.

First, please be advised that we will make Mr. [redacted] available for the requested PIP termination examination. I will contact Mr. [redacted] and obtain convenient dates and times for the examination. Hopefully, I will be able to contact Mr. Rooks by early next week and get dates to you.

However, to avoid any misunderstanding at the time of your proposed PIP termination examination, I am writing to let you know well in advance the following:

1. I reserve the right to attend the examination with Mr. [redacted], or have someone from my office do so;
2. I will record the examination via dictaphone, as allowed pursuant to CR 35(a);
3. Mr. [redacted] will submit to all requested examinations (within reason), but will not, as this is not an examination for purposes of receiving medical treatment, fill out any pain diagrams, medical history forms, or other such forms, or secure or bring with him any x-rays or records;
4. I would expect you to provide the PIP termination doctor(s) with whatever records, medical, billing or otherwise, you feel he/she may require in advance of the examination, something which will avoid the need for a

705 Second Avenue • 10th Floor • Hoge Building • Seattle, Washington 98104
Telephone: (206) 682-8813 • Facsimile: (206) 624-0273
E-mail: fultut@msn.com • Pager: (206) 918-7030

lengthy interview at the time of the examination. You have previously been provided with the required PIP medical authorization allowing you to order all relevant records and bills to provide to the PIP termination physician(s). Too often, examining physicians are provided with unorganized records and information which they attempt to review during the course of the PIP termination exam, something which unreasonably lengthens the time required for the examination and unnecessarily inconveniences your insured. As such, I trust that whatever records and bills are provided to the physician(s) will be provided in an organized and useable fashion to avoid such an occurrence in this instance;

5. I will need written confirmation from you prior to the date of this examination that **all** of Mr. [redacted] outstanding medical specials have been processed **through the date of the PIP termination examination**, i.e., your arbitrary October 1, 1998 date is unacceptable; and
6. I would ask that I immediately be provided with a copy of the examining physician's curriculum vitae so that I may ensure that this examination meets with the new PIP medical exam requirements contained in the Washington Administrative Code.

Finally, I would request that you send a copy of this letter to your PIP termination evaluator(s) well in advance of the examination so that none of these conditions come as a surprise to him/her at the time of the PIP termination examination. You doing this will avoid a potentially uncomfortable situation for all involved.

Sincerely,

Bradford J. Fulton

BJF:lq

cc: [redacted] (w/enc)

EXHIBIT D

HAELAN MEDICAL EVALUATIONS

TO: PEMCO Mutual Insurance Company
P.O. Box 97009
Lynnwood, WA 98046-9709

ATTENTION: [redacted]
Lynnwood Claims Department
1-800-552-7440, Extension 7738

RE: [redacted]
C/O Bradford J. Fulton, Attorney at Law
705 Second Avenue
10th Floor, Hoge Building
Seattle, WA 98104

Claim #: CA 0670198
DOI : 12-01-97
DOI : 02-02-98
DOB : 12-12-43

DATE OF EVALUATION: May 4, 1999

LOCATION OF EVALUATION: Mountlake Terrace Clinic

EXAMINER(s): Margaret L. Moen, M.D., Neurologist

The following is NHR/Haelan's report of Independent Medical Evaluation regarding [redacted]. The claimant was informed that this evaluation was at the request of PEMCO Mutual Insurance Company and that a written report would be sent to that agency. Furthermore, the claimant was informed that the purpose of the evaluation was to address specific injuries and/or conditions as outlined by the requesting agency and was not meant to constitute a general medical examination or substitute for his/her personal health care provider(s).

The opinions expressed in this report are those of the examiner(s) and do not reflect the opinions of NHR/Haelan.

We appreciate the opportunity to be of service to you and hope this information will be beneficial in determining the disposition of this claim. Thank you for this referral; and if you have any questions regarding this information, please contact our Quality Assurance Department.

RECORD REVIEW: The available records have been reviewed in detail and all pertinent data incorporated into this report.

The claimant is being seen in the presence of his attorney. He has been requested to be seen by PEMCO Mutual Insurance Company. He is seen in regards to automobile accidents of December 1, 1997, and January 2, 1998.

CHIEF COMPLAINT(s): Pain at the base of the skull; low back pain; head shaking; neck pain.

HISTORY OF CURRENT INJURY: The claimant is a 55-year-old male who was involved in the first motor vehicle accident on December 1, 1997. He had stopped at a light and had turned. He was then proceeding through the light when his vehicle was hit on the passenger rear quarter panel by another driver coming out of a gas station. The claimant was driving a Ford Taurus and was restrained at the time. He did not strike his head. He did note some numb sensation in the neck area after the automobile accident. He recalls his neck stiffening up while he was waiting in his car for the police to show up. He describes it more as a pressure and pain sensation than a stiffening.

He did not see a health practitioner that day. He believes he went to see Jerry Wickman, D.C., the following day. He had been following with Dr. Wickman prior to this automobile accident. He believes it had been several months since he had last seen his chiropractor. His chiropractor began a course of adjustments once he saw him, and then referred him on to physical therapy at Healthsouth Physical Therapy.

The claimant was seen in physical therapy on December 4, 1997. At that time, he was complaining of some neck and upper thoracic pain. They diagnosed segmental myofascial dysfunction. He does feel he received benefit from his course of physical therapy as well as from his chiropractic treatment. He did undergo physical therapy approximately one to two times a week.

He was seen by Gregory M. Engel, M.D., orthopedic surgeon, at Bellevue Bone and Joint on December 18, 1997. Dr. Engel noted his history of having been broadsided by another car and did note an aggravation of elbow problems. He also noted that the claimant had a neck strain, and the claimant recalls he was having some lumbar discomfort as well. Dr. Engel also noted some lumbar strain with this. Dr. Engel did not note any specific findings on examination at that time.

EXHIBIT E

WASHINGTON COURT RULES

STATE

1999

FOR REDBOOK RULES OF WASHINGTON
COURT RULES—FEDERAL 1999

FOR LOCAL RULES OF WASHINGTON
COURT RULES—LOCAL 1999

WEST GROUP

ty. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; September 1, 1997.]

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the 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. The party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination. Unless otherwise ordered by the court, the party or the party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. 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 that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

[Amended effective July 1, 1972; September 17, 1993.]

RULE 36. REQUESTS FOR ADMISSION

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. Requests

COUNCIL ON COURT PROCEDURES

221 University of Oregon
hool of Law
Eugene, OR 97403-1221

Telephone: (541) 346-3990
FAX: (541) 346-1564

Feb. 2, 2000

To: Kathryn Clarke
Skip Durham
Ralph Spooner

Fm: Maury Holland

Re: IME Material from Multnomah County

Here is a second batch of IME-related material which Mike Marcus sent to me for distribution to you.

OTLA
Oregon Trial Lawyers Association
In the Service of Justice

January 19, 2000

The Honorable Janice R. Wilson
Circuit Court of the State of Oregon
Fourth Judicial District
Multnomah County Courthouse
1021 S,W. Fourth Avenue
Portland, Oregon 97204-1123

Re: Input on Motion Panel Advisory Rulings related to ORCP 44 Examinations

Dear Judge Wilson:

Thank you for inviting comment from OTLA and its members regarding the Multnomah County Motions Panel advisory rulings on defense medical examinations. These rulings have long been a concern for civil plaintiffs and their attorneys, and we welcome the opportunity to provide information which might lead to a withdrawal of these rulings and/or new rulings which interpret ORCP 44 as providing procedural safeguards for our clients.

The Need for Procedural Safeguards

It is hoped that the court will acknowledge the reality of defense medical examinations (DMEs), which are an integral part of the adversary process. As such, the procedural safeguards available to litigants during DMEs should be the same as those available during other parts of the adversary process. This may not have always been the case, but DME practice has evolved over the years. It has now become common practice for a plaintiff to be sent to an examiner whose primary job is medical consulting for insurance and litigation purposes. Even where the examiner is also a treating practitioner, the examiner is not a court-approved "neutral" but, rather, has been selected and paid for by the defendant. In all cases, the reports are prepared in consultation with the defendant's attorney and without input from the plaintiff's attorney. In other words, the examiner is not an "independent" but, rather, an agent of the defendant.

During other integral parts of the adversary process, such as deposition or trial, all parties have the right to two basic procedural safeguards: 1) the right to be represented by counsel, and 2) the right to have an objective record of the

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proceedings. The current advisory rulings in Multnomah County deny to plaintiffs the right to counsel at the DME stage, and they deny to both parties the right to have an objective record of the proceedings. These advisory rulings are not mandated under ORCP 44; rather, they are a matter of court interpretation, since ORCP 44 is silent on these issues.

Objective Record of the Proceedings

Both sides should be allowed to record the examination. Audiotape recording was done many times during the breast implant litigation, based on a standing order entered by Judge Stephen Walker and followed by Judges Frank Bearden and Nely Johnson. This order was entered after disputes arose over what was said and done during defense psychiatric and neuro-psychiatric examinations. After the order allowing recording was in place, there was never another dispute of this type, because the audiotape served as the record of the proceedings.

Presence of Counsel

Plaintiff's counsel (or a designated representative) should be allowed to attend the DME as an observer. As with a deposition, counsel should not be allowed to interfere with or obstruct the examination, but should be allowed to note objections (if any) on the record for preservation purposes. The recording should serve as the record of the proceedings, and counsel should not be allowed or compelled to testify as to what was said or done during the examination.

Vocational Rehabilitation Exams

This ruling does not need to be revisited. The important issue for plaintiffs is that there be only one examination, and ORCP 44A specifies that the examiner be a physician (for a physical or mental examination) or a psychologist (for a mental examination).

Enclosures

The following documents are enclosed:

1. *Another View: ORCP 44, fairness and the search for truth*; article by Don Corson published in Oregon State Bar Bulletin, 4/99.

2. Letter opinion, *Winkler v. Morgan*, Clackamas County No. 90-8-394; ruling by Hon. Robert J. Morgan (allowing attorney to attend DME).

3. Order, *Modrich v. Josephine Memorial Hospital*, Josephine County No. 93-CV-0032; ruling by Hon. Gerald Neufeld (allowing representative to attend DME).

4. Order, *Strain v. Familian Northwest, Inc.*, Jackson County No. 98-1169; ruling by Hon. Ross Davis (allowing recording of DME).

5. Order, *Sarantis v. Farmers Insurance Company*, Lane County No. 16-97-08322; ruling by Hon. Jack Mattison (allowing recording of DME).

6. Advertisement, Columbia Medical Consultants, Inc.

Again, thank you for your attention to this matter, and feel free to contact me if you or the other members of the Motions Panel have questions or need additional information.

Very truly yours,

GAYLORD & EYERMAN, P.C.

Linda K. Eyerman

Linda K. Eyerman
LKE:dh
Enclosures

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

MICHAEL H. MARCUS
JUDGE
Department 34

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Michael.H.Marcus@State.Or.US

July 18, 2000

Prof. Maurice Holland
Executive Director
Council on Court Procedures
University of Oregon
School of Law Room 331
1101 Kincaid Street
Eugene OR 97403

Dear Prof. Holland:

I enclose copies of the latest input to the Multnomah Motion Panel concerning the DME/IME debate, which I understand you will copy and distribute to Justice Durham's committee.

I also enclose a copy of a letter to William Gaylord regarding some minor input on the medical record rule changes.

Thank you for your assistance in this matter.

Sincerely,

Michael H. Marcus
Judge

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

MICHAEL H. MARCUS
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William A. Gaylord
Gaylord & Eyerman, PC
Attorneys at Law
1400 SW Montgomery Street
Portland OR 97201-6093

July 18, 2000

Dear Mr. Gaylord:

Re: Rules 44 & 55

I promised some brief and minor input on the proposed rules.

First, I find this language, repeated several times in the proposed rule (and presumably taken from elsewhere) unnecessarily awkward and hard to read:

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

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

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

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

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

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

Sincerely,

Michael H. Marcus

MEMORANDUM

DATE: July 12, 2000

TO : Janice Wilson, Chair
Multnomah County Circuit Court Motion Panel

FROM: Robert W. Redding,
Circuit Judge

RE : Defense Medical Examinations - Monitoring

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

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

RWR/dlm

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

CIRCUIT COURT OF THE STATE OF OREGON
FOURTH JUDICIAL DISTRICT
JANICE R. WILSON
JUDGE
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
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May 26, 2000

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

Re: Motion Panel "Rulings" and ORCP 44 Examinations

Dear Counsel:

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

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

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

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

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

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

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

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

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

Sincerely,

Janice R. Wilson

cc: Hon. Michael H. Marcus w/enc ✓

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Angela N. Pinto
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Douglas D. Beebe
Paralegals

May 17, 2000

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

Re: *Motion Panel Rulings*

Dear Judge Wilson:

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

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

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

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

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

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

Sincerely,

Corbett Gordon Heidi Guettler Richard R. Meneghello

Russell S. Collins Kenneth Piumarta

From: "Benjamin M. Bloom" <bmb@roguelaw.com>
Reply-To: bmb@roguelaw.com
To: "cocp@law.uoregon.edu" <cocp@law.uoregon.edu>
Date: Tue, Aug 1, 2000, 1:46 PM
Subject: COCP: COCP & IME

Dear fellow members:

I will not be able to attend the August 12, 2000 meeting of the council. I will be at the September meeting. I am writing this letter to you to share my concerns about the proposed changes to ORCP 44. I think I bring some perspective to the issue as a practicing member of the civil defense bar and as a former plaintiff in a personal injury lawsuit.

Because of the physician-patient privilege in Oregon, as a defense attorney, I am not able to contact any of a plaintiff's treating physicians until after a plaintiff has voluntarily waived the privilege either by testifying at trial or by taking the discovery deposition of a treating physician. The only way to independently assess a plaintiff's injuries is to have a physician perform an IME.

In seven years of practice, I have heard stories ("urban legends" I suggest) about out of control IME doctors taking advantage of plaintiffs. I have never once encountered the abusive doctor or have I seen an IME doctor or a defendant sanctioned for abusing the IME process. I have never even seen a motion filed by a plaintiff to sanction a defendant or the IME doctor for abusing the practice. If the IME road is littered with abuses, why haven't we on the council seen any evidence?

Some members of the council and other attorneys suggest how difficult the IME experience can be for plaintiffs. I have done it. At age 19, after sustaining a traumatic brain injury, I underwent an IME as part of a lawsuit I filed in New Jersey. I suggest that in my mental and physical state I was as fragile, if not more, than the model plaintiff our proposed rule seeks to protect. I think I made it through the process alright and do not think it would have made a difference had my attorney been with me. I never gave it a second thought. I don't share this with you to brag. I accept that an IME can be difficult for a person. The discomfort the procedure causes for people, however, should not be an invitation to modify rule that has been essential to defense bar.

The IME rule has been around for a long time. It is an attempt to level the playing filed

between the parties. Bridges v. Webb, 253 Or 455, 457 (1969); Tomlin v. Holecek, 150
FRD 628, 632 (D. Minn. 1993). In addition to civil lawsuits, IMEs occur in workers'
compensation cases and in automobile insurance disputes. Before altering a rule of civil
procedure because of perceived abuses, we ought to demand proof that the abuses are in fact
occurring.

See you in September.

Benjamin M. Bloom

Spooner, Much & Ammann, P.C.

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August 18, 2000

BY FAX AND REGULAR MAIL
Robert D. Durham
Justice of the Oregon Supreme Court
1163 State Street
Salem, OR 97310-0260

Re: ORCP 44A

Dear Justice Durham:

After we spoke this week, I did some brief research regarding the current state of the law of privilege in Oregon and under what circumstances the privilege would be deemed to have been waived. The cases that touch on this subject primarily deal with situations involving documents. I did not find any cases on point related to oral disclosures. The Court of Appeals in GPL Treatment, Ltd. V. Louisiana-Pacific Corp., 133 Or App 633, 894 P2d 470 (1995), discusses the factors that the trial court should consider in determining whether a privilege is waived:

1. Whether disclosure was inadvertent;

2. Whether any attempt was made to remedy any error promptly;

3. Whether preservation of privilege will occasion unfairness to proponent.

Based upon this research, I am of the opinion that the alternative draft that I prepared would be legal with a slight change in the language. Instead of stating:

> "In the event the examinee discloses any information protected by the law of privileges, the disclosure shall not constitute a waiver of the privilege,"

the rule should state:

> "In the event the examinee discloses any information protected by the law of privileges, the disclosure shall be presumed not to constitute a waiver of the privilege."

Enclosed is a revised copy of the alternate draft I prepared. Please forward this alternate draft to Maury Holland and anyone else that needs it for the September meeting. You can indicate in the transmittal letter that this is a subcommittee minority draft or alternate draft prepared by Ralph C. Spooner. I have enjoyed working with you on this matter.

Best regards,

Ralph C. Spooner

Ralph C. Spooner

RCS/ccb
Encl.

cc: Kathryn Clarke (by fax and regular mail)

FINAL AMENDMENTS AS OF JUNE 1, 2000

Compelled Medical Examinations

(ORCP 44 A)

Add highlighted material to existing text of ORCP 44A:

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

is to be made. Unless the trial court requires other or different conditions for good cause supported by the record, the following conditions shall apply to a compelled medical examination under this rule:

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

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

A(3) No person may obstruct the examination. If an

obstruction occurs, the examinee or the examining physician or psychologist may suspend the examination. The court may order a resumption of the examination under any conditions that the court deems necessary to prevent obstruction. The parties may agree to resume an incomplete examination without an order by the court.

A(4) Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. The person requesting the recording shall be required to furnish at their expense, an original transcript of the stenographic notes or audiotape to the attorney for the examinee, or if unrepresented, to the examinee.

The transcription of the stenographic notes or audiotape shall be first made available to the attorney for the examinee or the examinee, if unrepresented, for the purpose of determining whether any privileged information was disclosed by the examinee. If there is a claim that privileged information was disclosed and that it

should be excised from the transcript, the attorney for the examinee or the examinee, if unrepresented, shall provide a privilege log of the information claimed to be privileged stating the general nature of the information and the basis for the claimed privilege to the attorney(s) for the other party(ies) or if unrepresented, to the other party(ies). The attorney for the examinee or the examinee, if unrepresented, shall provide a copy of the transcript to the attorney(s) for the other party(ies) or if unrepresented, to the other party(ies). The reasonable cost of the copy shall be paid by the the other party(ies). Any challenges to the claimed privilege will be resolved by the trial court following an *en camera* review of the information claimed to be privileged.

Spooner, Much & Ammann, P.C.

Ralph C. Spooner
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FAX COVER SHEET

DATE	:	August 22, 2000
TO	:	Gilma Henthorne - U of O Law School 541-346-1564
	cc:	Justice Robert D. Durham 986-5730
		Kathryn Clarke 503-224-3942
FROM	:	Ralph C. Spooner
RE	:	ORCP 44 - Version 2 Amendment
PAGES	:	5 (inclusive)
TO BE MAILED	:	No

Dear Gilma:

I reviewed Version 1 that represents the subcommittee's current draft and it is acceptable. Enclosed is Version 2, an alternate draft which I drafted. This does not represent the subcommittee's work. I had an opportunity to forward it to Justice Durham and Kathryn Clarke, but we have not had a chance to discuss it. I drafted it as an alternative to Version 1. The primary difference is that Version 2 does not permit attorneys to be present during the examination. I started with line 20, which is found at the bottom of page 1. I included that same line at the top of page 2 to give you a point of reference. All new text is bolded and underlined.

Ralph

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

A **Order for examination.** When the mental or physical condition of 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.

examination and the person or persons by whom it is to be made.

Unless the trial court requires other or different conditions for good cause supported by the record, the following conditions shall apply to a compelled medical examination under this rule:

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

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

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

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

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

COUNCIL ON COURT PROCEDURES
1221 UNIVERSITY OF OREGON
SCHOOL OF LAW
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Telephone: (541) 346-3990
FAX #: (541) 346-1564

September 25,2000

BY FAX

TO: Justice Durham
FAX 503-986-5730

FROM: Gilma Henthorne (541-346-3990)

Please review the enclosed pages. I found some mistakes, and perhaps you will have further changes. I don't know where the (2) came from in the amendment to Rule 46. When we talked, you were wondering whether we had incorporated all of your paragraphs in your letter which was distributed at the meeting. You will note we "lifted" your work out of Bill Gaylord's work.

Thank you for re-reading these pages. We must send them to Publications quickly.

cc: Kathryn Clarke (FAX ~~503-460-2870~~ busy)
503-224-3942

PROPOSAL NO. 1: PROPOSED AMENDMENTS TO RULES 44 A/46 B

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. *(One of the following alternatives will be added here and are shown as Alternative One, Alternative Two, and Alternative Three):*

Alternative One

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

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

A(2) *Representation; reservation of objections; assertion of privileges.* The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

A(3) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination

under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

(2) should be (a)

Alternative One includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs (a) (2), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A. (2) not needed

Alternative Two

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination

under this rule:

A(1) *Compliance with agreed conditions.* The parties and the examinee shall comply with any conditions for the examination to which they agree in writing.

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

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Alternative Two includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs (a) ~~(2)~~, (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party

to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A. not bold ✓

Alternative Three

The examinee's counsel or other representative may attend the examination by agreement of the parties or on order of the court. Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

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

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

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payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative Three includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs ~~(a), (b)~~, (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A. not bold

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

* * * * *

B Failure to comply with order.

* * *

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

* * *

B(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed

an examination under Rule 44 A. not forth

* * * * *

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

COUNCIL ON COURT PROCEDURES
1221 UNIVERSITY OF OREGON
SCHOOL OF LAW
EUGENE, OREGON 97403-1221

Telephone: (541) 346-3990
FAX #: (541) 346-1564

September 25, 2000

BY FAX

503-588-5899

TO: Ralph Spooner (FAX ~~503-378-7777~~)

FROM: Gilma Henthorne (541-346-3990)

RE: PROPOSED AMENDMENTS TO RULES 44 A/46 B

Justice Durham asked me to fax this to you and welcomes any suggestions. We are almost ready to go to press so time is of the essence.

Thank you for your time.

subsection B(3) of this rule.

* * * * *

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.

* * * * *

PROPOSAL NO. 1: PROPOSED AMENDMENTS TO RULES 44 A/46 B

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. *(One of the following alternatives will be added here and are shown as Alternative One, Alternative Two, and Alternative Three):*

Alternative One

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

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

A(2) *Representation; reservation of objections; assertion of privileges.* The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

A(3) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination

under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative One includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

Alternative Two

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination

under this rule:

A(1) *Compliance with agreed conditions.* The parties and the examinee shall comply with any conditions for the examination to which they agree in writing.

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

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Alternative Two includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party

to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

Alternative Three

The examinee's counsel or other representative may attend the examination by agreement of the parties or on order of the court. Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

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

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FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

B Failure to comply with order.

* * *

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

* * *

B(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed

an examination under Rule 44 A.

* * *

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

BY FEDERAL EXPRESS

COUNCIL ON COURT PROCEDURES
1221 UNIVERSITY OF OREGON
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EUGENE, OREGON 97403-1221

Telephone: (541) 346-3990
FAX #: (541) 346-1564

September 21, 2000

TO: Mic Alexander
Bill Gaylord

FROM: Gilma Henthorne (telephone: 541-346-3990)

RE: RULES 44/55; PROPOSAL NO. 1 AND PROPOSAL NO. 2

Attached are new Proposal No. 1 and Proposal No. 2. Mic, after we spoke today around 10:30, I made the changes you suggested, which were different from the previous corrections which you gave to Bill and Maury. I am giving Maury copies, also. You said you would confirm all of your changes by letter.

Please look at all of this carefully and fax to me pages showing corrections, etc. If you think everything is all right, could you indicate with an okay.

Thanks to all of you for taking the time to deal with this in a rush.

cc: Maury Holland (with encs.)

REVISED 9-21-00
11:00 a.m.

K **PROPOSAL NO. 1: PROPOSED AMENDMENTS TO SECTION 44 A**

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. *(One of the following alternatives will be added here and are shown as Alternative One, Alternative Two, and Alternative Three):*

Alternative One

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

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

A(2) *Representation; reservation of objections; assertion of privileges.* The examinee may have counsel or

another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

A(3) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative One includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs (2), (b), and (c) of this subsection, where a party has

failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

Alternative Two

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance with agreed conditions.* The parties and the examinee shall comply with any conditions for the examination to which they agree in writing.

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

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Alternative Two includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs (2), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

Alternative Three

The examinee's counsel or other representative may attend the examination by agreement of the parties or on order of the court. Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

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

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Alternative Three includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs (2), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

REVISED 9-21-00
11:00 a.m.

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.*]

(delete title and text)

C Health care records.

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

C(2) *Pretrial discovery of health care records from a party.* Any party against whom a civil action is filed for damages 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, *Pretrial subpoena of health care records from health care provider or facility.*

D Report; effect of failure to comply.

(text unchanged)

[*E Access to hospital records.*]

(delete title and text)

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 hospital 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 **included**..

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*. 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 section 6 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 hospital or health care provider 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 subsection (9) of this section, when a subpoena is served upon a custodian of health care records in an action in which the health care provider is not a party, and the subpoena requires the production of all or part of the records of the health care provider relating to the care or treatment of a patient of the health care provider, it is sufficient compliance therewith if a custodian delivers by mail or otherwise the number of true and correct copies of all the records responsive to the subpoena indicated in the subpoena or statement of instructions, within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection 8 of this section. The copies may be photographic or microphotographic reproduction.

H(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(7) and H(8) 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 health care records are received from health care provider pursuant to subpoena.*** Upon receipt of the sealed copies of the health care records addressed to each of the parties seeking access to them, the party whose records are sought, or his or her attorney, shall open only the copy addressed to that party or attorney, and shall have 14 days in which to review them. Not later than 14 days after receipt of the records from the health care provider or facility, the party whose records are sought shall either serve the unopened 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 pursuant to paragraph (2)(b) above, or objection to any part of the health care records sent by a provider in response thereto, the party issuing the SUBPOENA and AUTHORIZATION may seek an order compelling discovery pursuant to Rule 46.

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 paragraph H(2)(b) of this rule.

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

action is pending, accompanied by an affidavit described in subsection H(8) of this rule. The copy may be photographic or micro photographic. The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the health care provider or facility, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope shall be addressed to the clerk of the court or to the judge if there is no clerk.

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

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

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

R E V I S E D

FRIDAY, SEPTEMBER 15, 4:00 P.M.

Compelled in title

Alternative 1

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

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

A(2) *Representation; reservation of objections; assertion of privileges.* The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

A(3) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Post-it® Fax Note 7671	Date 9-15-00 # of pages ▶
To K. Clarke	From Gilma
Co./Dept.	Co.
Phone #	Phone # 714-344-3990
Fax # 1-503-460-3870	Fax # 541-344-1564

Alternative 2

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance with agreed conditions.* The parties and the examinee [and their representatives] shall comply with any conditions for the examination to which they agree in writing.

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

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

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

Alternative 3

The examinee's counsel or other representative may attend the examination with the agreement of the parties or order of the court. Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance with agreed conditions.* The parties and the examinee and their representatives shall comply with any conditions for the examination to which they agree in writing.

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

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

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

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

Does not exist

* * * * *

B Failure to comply with order.

* * *

B(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed

an examination under Rule 44 A.

R U S H

ATTENTION: JILL

(FAX No. 2)

COUNCIL ON COURT PROCEDURES
1221 UNIVERSITY OF OREGON
SCHOOL OF LAW
EUGENE, OREGON 97403-1221

Telephone: (541) 346-3990
FAX #: (541) 346-1564

September 19, 2000

TO: Mic Alexander (FAX 503-588-7179)

FROM: Gilma Henthorne (telephone: 541-346-3990)

Attached are:

1) Proposed amendments to section A (five pages) approved for publication by Skip Durham and Kathryn Clarke

2) Skip Durham's proposed amendments to section A (distributed at the meeting)

3) Ralph Spooner's proposed amendments to section A (part of Packet I submitted with the agenda)

Know you are really busy. Hope my notes will jog your memory. I am being pushed to get everything together as soon as possible to meet the publication date.

REVISED SEPTEMBER 18, 2000, 12:40 P.M.

PRETRIAL DISCOVERY OF HEALTH CARE RECORDS; 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. *(One of the following alternatives will be added here and are shown as Alternative One, Alternative Two, and Alternative Three):*

Alternative One

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

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

A(2) *Representation; reservation of objections; assertion of privileges.* The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures

Approved by Chip Dunham and Kathryn Clarke.

followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

A(3) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative One includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs (2), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to

comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

Alternative Two

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance with agreed conditions.* The parties and the examinee shall comply with any conditions for the examination to which they agree in writing.

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

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

A(4) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the

person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative Two includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs (2), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

Alternative Three

The examinee's counsel or other representative may attend the examination by agreement of the parties or on order of the court. Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

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

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

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

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

Alternative Three includes the following proposed amendment to B(2)(e) of Rule 46: Such orders as are listed in paragraphs (2), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

FINAL AMENDMENTS AS OF SEPTEMBER 8, 2000

Compelled Medical Examinations

(ORCP 44 A)

Add highlighted material to existing text of ORCP 44A:

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

Requisite copies can be made on which exact changes can be made for each alternative.

is to be made. Take new language Unless the trial court requires other or different conditions for good cause supported by the record, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance With Agreed Conditions*. The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.

A(2) *Representation; Reservation of Objections; Assertion of Privileges*. The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

A(3) *Obstruction*. No person may obstruct the examination.

all

If the examinee, counsel, or the examining physician or psychologist suspends the examination based on a good faith claim that a person has obstructed the examination, the court may order a resumption of the examination under any conditions that the court deems necessary to prevent obstruction. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of Examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of Record.* Upon request, and upon payment of the reasonable charges for transcription and copying,

the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

all new

Add highlighted material to ORCP 46B(2)(e):

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

New

VERSION TWO (part of Packet I)

(submitted by Ralph Spooner)

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

A Order for examination. When the mental or physical condition of 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.

Copies can be made on which exact changes can be made (if this version is actually to be submitted)

examination and the person or persons by whom it is to be made.

Unless the trial court requires other or different conditions for good cause supported by the record, the following conditions shall apply to a compelled medical examination under this rule:

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

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

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

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

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

R U S H

COUNCIL ON COURT PROCEDURES
1221 UNIVERSITY OF OREGON
SCHOOL OF LAW
EUGENE, OREGON 97403-1221

Telephone: (541) 346-3990
FAX #: (541) 346-1564

August 22, 2000

TO: Ralph Spooner (FAX:503-588-5899)

FROM: Gilma Henthorne

RE: ORCP 44 A

Here is a version of Rules 44 and 46 after the last Council meeting. Lawrence Howard faxed to us your new draft, but it is missing page 1. Your assistant said she would fax that page to us.

Ralph, could you look at the attached today. Feel free to print or write legibly any notes you want to make, and please fax it back to us since time is of the essence.

Maury Holland is looking at your draft so I don't have it in front of me. Did you bold and highlight new language so that it is clear what is new?

Your assistant, Connie, was talking about another draft. Perhaps you should fax again to us the exact pages you want us to include with our packet of materials.

Thank you so much.

Enc.

Note: If this rule is adopted here, it will be included in the version submitted with Rule 55.

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

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

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

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

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

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

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

* * * * *

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

* * * * *

B Failure to comply with order.

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

B(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent or a person designated under Rule 39 C(6) or 40 A to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A of this rule or Rule 44, the court in which the action is pending may make such orders in regard to the failure as are just, including among others, the following:

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

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

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

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

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

* * *

FINAL AMENDMENTS AS OF SEPTEMBER 8, 2000

Compelled Medical Examinations

(ORCP 44 A)

Add highlighted material to existing text of ORCP 44A:

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

is to be made. **Unless the trial court requires other or different conditions for good cause supported by the record, the following conditions shall apply to a compelled medical examination under this rule:**

A(1) ***Compliance With Agreed Conditions.*** **The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.**

A(2) ***Representation; Reservation of Objections; Assertion of Privileges.*** **The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.**

A(3) ***Obstruction.*** **No person may obstruct the examination.**

If the examinee, counsel, or the examining physician or psychologist suspends the examination based on a good faith claim that a person has obstructed the examination, the court may order a resumption of the examination under any conditions that the court deems necessary to prevent obstruction. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of Examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of Record.* Upon request, and upon payment of the reasonable charges for transcription and copying,

the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Add highlighted material to ORCP 46B(2)(e):

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

Version I

is to be made. Unless the trial court requires other wise, ~~or different conditions for good cause supported by the record~~, the following conditions shall apply to a compelled medical examination under this rule:

change to writing rep.

A(1) *Compliance With Agreed Conditions.* The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.

A(2) *Representation; Reservation of Objections; Assertion of Privileges.* The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

Kathryn said don't delete

Dale

A(3) *Obstruction.* No person may obstruct the examination.

Post-it® Fax Note 7671	Date 9-15-94	# of pages ▶
To K. Clarke	From Gt. Hendrickx	
Co./Dept.	Co.	
Phone #	Phone # 541-346-3870	
Fax # 1-503-460-2870	Fax # 541-346-1564	

Hendrickx's notes

Version I

f the ~~examinee, counsel, or the examining~~ physician or psychologist suspends the examination, ~~based on a good faith claim that a person has obstructed the examination~~, the court may order a resumption of the examination under ~~any~~ conditions that the court deems ~~necessary~~ appropriate to prevent obstruction. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of Examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of Record.* Upon request, and upon payment of the reasonable charges for transcription and copying,

the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

a failure question

B. On good cause shown the court may allow the examinee to have counsel or other representative present during the examination. This provision in no way limits the court's discretion to order other conditions on the examination.

Maureen note as a result of working with Mic. But where should it go?

Kathryn says this was not approved.

V-2

No HP

RULES 44/46 (Kersten's note)

(REVISED)

FINAL AMENDMENTS AS OF SEPTEMBER 8, 2000

Compelled Medical Examinations

(ORCP 44 A)

V. 2

Add highlighted material to existing text of ORCP 44A:

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

is to be made. **Unless the trial court requires other or different conditions for good cause supported by the record, the following conditions shall apply to a compelled medical examination under this rule:**

A(1) ***Compliance With Agreed Conditions.*** **The parties and the examinee, ~~and their representatives~~ shall comply with any conditions for the examination to which they agree in writing.**

A(2) ***Representation; Reservation of Objections; Assertion of Privileges.*** **The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.**

A(3) ***Obstruction.*** **No person may obstruct the examination.**

(2)

If the examinee, counsel, or the examining physician or psychologist suspends the examination based on a good faith claim that a person has obstructed the examination, the court may order a resumption of the examination under any conditions that the court deems necessary to prevent obstruction. The parties may agree to resume an incomplete examination without an order by the court.

A(3)(4) *Record of Examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(4)(5) *Transcription of Record.* Upon request, and upon payment of the reasonable charges for transcription and copying,

the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Add highlighted material to ORCP 46B(2)(e):

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

V-3
no rep
-Eg V-2

RULES 44/46 (incorporate V-2 changes)

(REVISED)

The examinee's counsel or other representative may attend the examination w/ agreement of the parties, or order of the Court.

is to be made. **Unless the trial court requires other ~~or different conditions for good cause supported by the record~~, the following conditions shall apply to a compelled medical examination under this rule:**

Is this Mrs. Karstens handwriting and where does it go?

A(1) *Compliance With Agreed Conditions.* The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.

A(2) *Representation; Reservation of Objections; Assertion of Privileges.* The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

A(3) *Obstruction.* No person may obstruct the examination.

Gilma

Howie V-2

If the examinee, counsel, or the examining physician or psychologist suspends the examination based on a good faith claim that a person has obstructed the examination, the court may order a resumption of the examination under any conditions that the court deems necessary to prevent obstruction. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of Examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of Record.* Upon request, and upon payment of the reasonable charges for transcription and copying,

the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.