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December Events

December 10, 1999

Deadline Extended

On December 10, the Clinton Administration announced it was extending the deadline for the public to submit comments on the proposed health privacy regulations. In response to requests from the Health Privacy Project, the Consortium for Citizens with Disabilities, the American Medical Association, health plans, and others, the Administration extended the public comment deadline for 45 days. The new deadline to submit comments on the proposed rule is February 17, 2000. (A final rule is set to be issued February 21, but we anticipate that date will be revised to accomodate the extension.)

October Events

Friday, October 29, 1999

President Clinton Unveils Sweeping Health Privacy Proposal

On October 29, President Clinton unveiled a proposal for sweeping new rules to protect the privacy of peoples' medical records. "When finalized, these landmark regulations will be the first enforceable federal health privacy rules," stated Janlori Goldman, Director of the Health Privacy Project at Georgetown University. "The Administration has made significant headway where Congress could not to restore public trust and confidence in our nation's health care system," Goldman continued.

"A substantial barrier to improving the quality of care and access to care in this country has been the absence of enforceable privacy rules. People are withdrawing from full participation in their own health care because they are afraid their health records will fall into the wrong hands, and lead to discrimination, loss of benefits, stigma, and unwanted exposure," continued Ms. Goldman. A January 1999 survey by the California Health Care Foundation found that one out of every six people engages in some form of privacy-protective behavior to shield

themselves from the misuse of their health information, including lying to their doctors, providing inaccurate information, doctor-hopping to avoid a consolidated medical record, paying out of pocket for care that is covered by insurance, and- in the worst cases- avoiding care altogether.

Congress recognized the importance of protecting health privacy when it passed the Health Insurance Portability and Accountability Act of 1996. In that law, it imposed a deadline on itself to enact comprehensive health privacy rules by August 21, 1999. The failure to meet that deadline triggered a requirement for the Secretary of Health and Human Services to issue final health privacy regulations by February 2000.

The draft rules issued today apply to health care providers, health plans, and clearinghouses (entities that process and transmit claims data) that transmit health information in electronic form. Therefore, other health-related entities are not directly covered. The Secretary was legally prohibited from covering additional entities or paper records under HIPAA. Clearly, there is still a significant role for Congress to play in filling these gaps.

Key provisions of the proposed rule are:

Access - People would have the right to see and copy their own medical records. Most states do not currently grant people such a sweeping right of access.

1. **Limits on Disclosure** - For disclosures other than those related to treating an individual and paying for his or her care, health care providers and health plans would required to obtain the patient's consent. Under the proposal, the consent must be voluntary, and can not be tied to the delivery of any benefits or services. Current practice usually requires people to sign broad waivers of their privacy as a condition of receiving health care or health benefits.

2. **Research** - All research would fall under a standard set of rules known as "The Common Rule." At present, only federally-funded research is governed by the common rule, which requires a research project to be overseen by an Institutional Review Board (IRB) to determine the need for patient authorization.

3. **Penalties** - Health care providers, health plans, and clearinghouses would be subject to civil and criminal penalties (up to $25,000/year and 10 years in jail) for violating the law. The Secretary is constrained under HIPAA from including a private right of action for individuals to sue for violations of the law.

4. **Law Enforcement** - Health care providers and plans would be prohibited from releasing patient data to federal, state, or local law enforcement without some form of legal process, including a warrant, court order or administrative subpoena. The Administration has reversed itself from its 1997 position that law enforcement should continue to have unfettered access to medical records, however this proposal continues to fall short. There is no requirement that a judge or other neutral magistrate approve or deny law enforcement access.

5. **Preemption** - The federal regulations would not preempt, or override, stronger state law. Instead, they would set a baseline floor of protections, above which the states could go to better protect their citizens. A July 1999 report issued by the Health Privacy Project found that while few states have comprehensive health privacy laws, most states have enacted legislation to protect sensitive information, such as mental health, communicable disease, and genetic testing.

To Read More about the Draft Regulations:

Health Privacy Project Summary of Draft Regulations
Remarks by President Clinton (10/29/99)
AP Story (10/29/99)
Table of Contents for the HHS Draft Privacy Regulations
Copy of Draft Regulations

Monday, October 25, 1999

Remarks By the President At Prescription Drugs Event

On October 25, at a prescription drugs event, President Clinton indicated that the Administration's draft regulations may be released in "the coming days." The text of his comments follows.

> 10:55 A.M. EDT
> THE PRESIDENT: ...So we have a lot more work to do, even though we're already in the last week of October. Congress still has not done a lot of things. Because they have not taken action to protect the privacy of medical records, I will use the power of my office to do that in the coming days. I think that's a very important issue. (Applause.)

August Events

August 20, 1999

The Deadline Nears for Issuing Federal Regulations

The 1996 Health Insurance Portability and Accountability Act (HIPAA) includes a deadline for enacting federal health privacy rules. HIPAA requires that if Congress fails to pass comprehensive health privacy legislation by August 21, 1999, the Secretary of Health and Human Services must issue regulations by February 21, 2000.

That August deadline has come and gone and Congress has failed to act. In fact, despite the introduction of more than a dozen proposals, health care privacy legislation hasn't even emerged from one Congressional committee. As required under HIPAA, the Secretary of HHS has assembled a team within the Department to begin drafting regulations. The department plans to issue draft health privacy regulations this fall to allow for the required 60 day comment period prior to promulgating final regulations.

The Secretary's regulations are critical, but should best be understood as an interim measure. Congress has the authority to pass a comprehensive federal law at any time it chooses. Even as HHS moves forward with regulations, the Congress can pass legislation that will override the regulations. In fact, many members of Congress have indicated that they plan to take up the comprehensive health privacy bills this fall after the August recess.

Again, once issued, the Secretary's regulations will only be in effect until such time that Congress passes a law. In the event that Congress passes a federal law, a new set of regulations would need to be drafted so that they are in accordance with the law.

July Events

July 30, 1999

Privacy advocates win a major medical privacy victory on the financial services bill (H.R. 10). On Friday, July 30, the House voted to instruct the conferees to remove a damaging medical privacy section from the overall bill, as the Administration, the Health Privacy Project and other privacy and consumer groups advocated.

For more information see letters opposing H.R. 10 from the Consumer Coalition for Health Privacy and the Health Privacy Project and a joint statement from the Coalition and the Consortium for Citizens with Disabilites.

July 20, 1999

Health Privacy Project Releases State-by-state Analysis of Health Privacy Statutes; First Report Comparing Privacy Laws Nationally Shows Wide Variation in Consumer Protections

The Health Privacy Project released a detailed report of how states are legislating medical records confidentiality. Entitled "The State of Health Privacy: An Uneven Terrain," the report is the first publication of its kind to provide a comprehensive comparison of health privacy laws at the state level. The report was funded by the Robert Wood Johnson Foundation and includes individual summaries of health privacy-related statutes in all 50 states and the District of Columbia.

Based on a review of state laws conducted over the past 18 months, the authors conclude that, on the whole, "state laws are weak and incomplete" in the broad areas federal legislation seeks to regulate, such as patient access to medical records, limits on disclosure of health information, law enforcement access to records, and remedies for violations of privacy rules. However, in areas involving specific illnesses or conditions such as HIV/AIDS or genetic disorders, states have enacted detailed legislation.

"Our analysis is the first to delineate the ways states have legislated medical records confidentiality," said Janlori Goldman, director, Health Privacy Project. It shows tremendous unevenness, inconsistency, confusion, and lack of coherence across states in their protection of basic privacy principles.

July 14, 1999

NATIONAL PANEL OFFERS BLUEPRINT FOR MEDICAL PRIVACY; RECOMMENDS 11 "BEST PRINCIPLES"

The nation's most diverse non-governmental panel on health privacy issued a report detailing steps that should be taken to ensure strong privacy protection for medical records. The Health Privacy Working Group's blueprint comes just weeks before Congress' August 21 deadline to take action on health privacy legislation. It is the first consensus document of its kind to offer recommendations regarding how best to protect patient confidentiality, while also ensuring appropriate access to personal medical information can be gained when necessary. Click here for a copy of Best Principles for Health Privacy.(PDF)

"Computerized medical records could vastly improve medical care, quality of care, and control costs of care. But we can't take advantage of this potential unless we have strong protection for patient privacy and confidentiality," said prominent ethicist Dr. Bernard Lo, chair of the non-partisan Health Privacy Working Group, and director of the Program in Medical Ethics at the University of California, San Francisco. "These eleven principles should go a long way toward establishing appropriate protections."

The Working Group is staffed by The Health Privacy Project of

HEALTH PRIVACY PROJECT
GEORGETOWN UNIVERSITY
INSTITUTE FOR HEALTH CARE RESEARCH AND POLICY

Summary of Draft Administration Proposal

Currently, there is no comprehensive federal law that protects the privacy of peopleís medical records. The 1996 Health Insurance Portability and Accountability Act (HIPAA) included legislative/regulatory deadlines in order to fill this significant gap in federal rules. HIPAA provides that if Congress failed to pass a comprehensive health privacy law by August 21st, 1999, the Secretary of Health and Human Services is required to issue *final* health privacy regulations by February 2000.

Despite the introduction of numerous bills, and many hearings over the past three years, Congress did fail to pass health privacy legislation and thus triggered the regulatory deadline.

On October 29, 1999 the Clinton Administration issued its draft regulations, allowing for the required 60-day comment period.

Key provisions of the proposed regulations are summarized below, with comments.

	The Administrationís Draft Regulations	Health Privacy Project Comments
Who's Covered	Health Plans (HMOs, Health Insurers, Group Health Plans including many ERISA plans) Health Care Clearinghouses (An entity that processes health information going from a health care provider to a payer) Certain Health Care Providers (Those who use computers to transmit health information.)	Under HIPAA, the Secretary only has the authority to cover these three entities. The regulations, therefore, do not directly apply to many other entities that collect and maintain health information such as life insurers, researchers, and public health officials.

What's Covered	Only the use and disclosure of ìprotected health informationî is covered. In order to be considered ìprotected health informationî under the regulations, information must: Relate to a personís physical or mental health, the provision of health care, or the payment of health care; Identify, or could be used to identify, the person who is the subject of the information; Be created by or received from a covered entity; *and* Have been electronically maintained or transmitted by a covered entity at some point.	The Administration was only legally able to cover a limited amount of information under HIPAA. Therefore the regulations would fail to cover a large portion of health care information: Information maintained solely as paper records is *not* covered. Identifiable health information *generated by entities not covered* by the regulations such as employers or schools when not acting as providers or plans. Only Congress can fill in these critical gaps.
Fair Information Practices	Covered entities may not use or disclose more than the *minimum amount of protected health information necessary* to accomplish the intended purpose. There are incentives for covered entities to create and use ìde-identified information,î health information which has been stripped of elements that could be used to identify individual subjects.	Generally, the use and disclosure of information that does not identify individuals does not compromise patient confidentiality. As such, these requirements would represent a significant step forward from current information practices and help to ensure that peoplesí privacy can be maintained to the maximum extent possible.

Patient Access	Individuals have a right to see and copy their own health information, including documentation of who has had access to this information. Individuals are given the right to request amendment or correction of health information that is incorrect or incomplete. There are limited exceptions to when a patient can access their own information such as when such access would endanger the life or safety of any individual.	Currently, there is no federal law granting persons the right to obtain their medical records. Although the majority of states provide patients the right of access to *some* of their medical records, very few do so in a comprehensive fashion. In fact, some states have *no* such statutory right of access. The proposed regulations therefore, establish a significant, new legal right for individuals.
Notice	Health plans and health care providers are required to provide written notice of their privacy practices, including a description of an individualís rights with respect to protected health information (such as the right to inspect and copy health records) and the anticipated uses and disclosures of this information that may be made without the patientís written authorization.	Up-front notice is essential to help patients understand how their health information will be used, and by whom. Notice is also an essential component of giving people the ability to make informed choices.

Patient Authorization *not* Required	Covered entities and their business partners are allowed to use and disclose a patientís protected health information *without* a patient's authorization for: treatment, payment, and health care operations related to treatment and payment (such as quality assessment; performance review; training programs; licensing and audits).	Requiring authorization for these activities would be preferable, in so far as it can define a moment in which providers and plans can discuss privacy concerns with patients. The proposal, however, identifies a *finite* list of activities that are allowable. Through the notice requirement, patients can better understand how their information will be used and disclosed.
Patient Authorization *Required*	Authorization is required for all purposes *other than* treatment, payment and health care operations. Furthermore, these authorizations must be truly voluntary – covered entities may not condition treatment or payment on receiving the authorization. The individual has to be notified if the covered entity would gain financially from using or disclosing health information.	Today, patient sign broad waivers that cover almost any foreseeable uses and disclosures of health information. By requiring an authorization for all uses and disclosures outside of core health care functions, patients stand to have much greater control over the health information.
Psychotherapy Notes	Separate, voluntary authorization is required for the use and disclosure of psychotherapy notes in the vast majority of circumstances, including treatment, payment, and health care operations. In addition, a patient can not be refused treatment, enrollment in a health	Psychotherapy notes differ considerably from other kinds of information in a patientís medical record. Such notes are highly subjective and sensitive, and should not be made available beyond the treating provider without the patientís consent.

	plan, or payment of a claim if he or she refused to authorize disclosure.	
Judicial and Administrative Hearings	Covered entities may only disclose protected health information in judicial and administrative proceedings if the request for the information is made through or pursuant to a court order. This rule does not apply if the information being requested relates to a party to the proceeding whose health condition is at issue.	The proposed regulations create a *new* protection for individuals whose health information is requested in judicial or administrative proceedings.
Health Oversight	Covered entities may disclose protected health information to public oversight agencies without individual authorization to conduct activities such as audits; inspections; civil, criminal or administrative proceedings or actions; and other activities necessary for appropriate oversight of the health care system and of government benefit programs for which health information is relevant to beneficiary eligibility. Such information may not be used against an individual in a case unrelated to the oversight activity.	The regulations would *not* create any new right of access to health records by oversight agencies. However, because HIPAA legislative authority does not cover oversight agencies, the regulations cannot restrict the further use and disclosure of protected health information once it is obtained by these agencies.
Minors' Rights	The confidentiality protections follow a minor's legal right to obtain health care. Under the regulations, patients below the age of 18 who have the legal capacity to obtain health care *on their own* will have the same	This provision mirrors current state privacy laws. States will retain the authority to make decisions about when a minor may consent to treatment without adult involvement, and to exercise their rights

	rights as an adult with regard to their health information. The provision also leaves intact current state law with respect to parents and minors. Where a parent has a legal right to access health care information, they retain that right.	with regard to their health information.
Research	Covered entities can disclose protected health information without a patient's authorization only to researchers whose protocol has been reviewed and approved by a "privacy board." The "privacy board." a new entity, could be either An Institutional Review Board constituted under the federal "Common Rule," or, An equivalent privacy board that meets certain requirements, in the case of privately funded research. The proposed regulations include new evaluation criteria for all privacy boards. Information can only be released to researchers if it meets the criteria.	Currently, only research *that receives federal funding* is subject to the "Common Rule," a federal regulation that requires that any use of identifiable private information be overseen by an Institutional Review Board (IRB). One of the IRBís functions is to determine patient authorization requirements for the research project. The proposed regulations take an important step forward by expanding the scope of the Common Rule to *all researchers*, including privately funded researchers. In effect, they create a level playing field.
Law Enforcement	Covered entities are permitted to disclose protected health information to law enforcement officials: Pursuant to warrant, subpoena, or order issued by a judicial officer;	In the Secretary's 1997 recommendations to Congress, the Administration took the position that law enforcement authorities should continue to have unfettered access to peoplesí health

	Pursuant to a grand jury subpoena; and Pursuant to an administrative subpoena or summons, civil investigative demand or similar certification where a three-part test is met: the information is relevant, the request is specific, and de-identified information could not reasonably be used. Because the regulations cannot directly control the actions of law enforcement personnel, the provisions require covered entities to ensure that the latteris three-part test is met. The regulations also permit disclosures without any written request: for purposes of identifying a suspect, fugitive, material witness, or missing person; about the victim of a crime, abuse or other harm; for the conduct of intelligence activities; when the covered entity believes in good faith that the information relates to health care fraud; and in urgent circumstances.	information. The proposed regulations are a departure from this previous position, and would represent new rules for federal, state and local law enforcement officials. The proposal, however, falls far short of the standards established in most federal privacy laws. Only the first category requires any independent judicial review. Administrative summons and subpoenas may be issued by the investigating authority *with no independent review* of a neutral magistrate to determine whether the request should be granted or denied.
State Public Health Laws	Disclosures made for public health purposes, as required under state laws, do not require patient authorization. Such laws include reporting of diseases or injuries, the collecting of vital statistics, public health surveillance, or public health investigation or intervention.	This icarve-outî was made explicit in HIPAA. States have traditionally exercised oversight and authority of public health laws and the proposal maintains their authority.

Enforcement	HIPAA grants the Secretary the authority to impose civil monetary penalties against covered entities that fail to comply with the requirements of these rules, and also establishes criminal penalties for certain wrongful disclosures of protected health information. The civil fines are capped at $25,000 for each calendar year for each provision that is violated. The criminal penalties are graduated, increasing if the offense is committed under false pretenses, or with intent to sell the information or reap other personal gain. The maximum is 10 years in prison. The Secretary will, to the extent practicable, seek the cooperation of covered entities in obtaining compliance. Individuals who believe that a covered entity is not complying with the regulatory requirements may file complaints with the Secretary.	These penalties are the maximum allowable under HIPAA. The Administration did not have the legal authority to increase, or alter, the penalties. Of concern is that HIPAA does not provide for a private right of action for individuals, which would allow individuals to sue for violations of their rights. The Administration is on record supporting a private right of action in pending legislation. Only Congress, however, can give people a right to this critical enforcement mechanism.
Preemption	HIPAA provides that state laws that are more protective of individual privacy will stand. States are also free to pass stronger laws in the future. The regulations, therefore, will serve as a baseline of minimum privacy protections, and allow states to maintain and enact stronger health privacy	Leaving stronger state laws in place is critical. Although most states do not have comprehensive health privacy laws, many states do have detailed, stringent standards governing the use and disclosure of health information related to certain medical conditions, such as mental health, genetic

	laws.	testing, and communicable diseases. These stronger privacy protections would remain in force.

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January 7, 2000

TRANSMITTED VIA FAX

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RE: ORCP 44/55 Subcommittee

Dear Friends:

I am writing to tell you what I know about the status of the subcommittee work continuing from last cycle on the project to rework the way we deal with the exchange of medical records in personal injury actions.

The subcommittee has been chaired by Judge Anna Brown until her move to the federal court, which disqualified her from the Council. However, she and I have continued to work on this project in an effort to finish a draft of new rules that incorporates as many ideas as the subcommittee has developed by consensus to date. Judge Brown and I have met twice since her move across the park, and the ball is still in my court to finish the draft language for both rules, to the extent of those ideas. Our meeting scheduled in December was postponed for conflicts in each of our schedules, and is now set to occur on January 18th at my office.

By the way, the point of our meeting without the full subcommittee has not been to exclude anyone from the process, but to work more efficiently on the scrivening part of the task, in order to get the aforementioned consensus into written form for further discussion. I hope it is clear that no one has signed off on any idea or language as a final position or proposal to the Council yet.

The current draft rule language is not ready for prime time. About half of it is complete as to the last round of discussions, and the other half is still left over from prior drafts. I do not think its present posture would look sensible to anyone not aware of the state of our talking and thinking about it, until it is at least made internally consistent. Please bare with us while we take a couple more weeks to get it all into the same generation of drafting.

In the meantime, I am going to try to recap the concepts we are trying to write into this current draft, so that new members of the subcommittee can begin thinking about them, and continuing members can correct me if I am wrong about what has been tentatively decided. I do have in my file and my hard drive, a pretty complete set of prior drafts and lots of notes kept throughout them of where our thinking as been and how it has evolved. I believe Judge Brown and some of the other subcommittee members also have notes and drafts, in case it becomes important to retrace all of our steps.

The goals, as I recall our early work on this revision, are to:

1. Restore to the rules a clear opportunity for the person whose records are sought to oppose production of some or all of them as categorically privileged or outside the scope of discovery. By "categorically," I mean without necessarily having the actual records yet in possession, and without focusing on specific contents of them. In other words, an opportunity to object needs to occur before the health care provider copies and forwards those records.

2. Restore to the rules a clear opportunity for the person whose records are sought to oppose production of some or all of them as specifically privileged or outside the scope of discovery, i.e., not appropriate by their contents for disclosure in the particular case. This contemplates a chance to raise objection after the records are copied and provided to the patient or their counsel, but before they are forwarded to the party seeking disclosure, instead of the *de facto* waiver of any claim of privilege or scope of discovery caused by present procedures in which records are often in the hands of opposing counsel before the patient's counsel has a chance to inspect them.

3. To facilitate reliable and complete disclosure of discoverable health care records to parties entitled to receive them, without requiring those parties to rely on provision of the records by the adverse party.

4. To facilitate reliable and complete disclosure of discoverable health care records to parties entitled to receive them, without the need for repetitious requests or subpoenas, and without the burden on parties and health providers of repeatedly handling and disputing the same records.

5. To preserve simple Request for Production procedures for discovery of medical records when parties are able to cooperate in good faith without suspicion.

6. To give health care providers clear guidance and reduce redundancy of performance in order to comply with the parties' needs for copies of health care records.

7. To eliminate arbitrary differences in treatment of so-called "Hospital Records" versus "Medical Records" under existing ORCP 55H and 55I, while complying with existing and comprehensive statutory definitions of health care records found in ORS 192.

8. To take advantage of existing legal sanctions for non-compliance with, or appropriate objection to, discovery requests (as between parties to litigation); and for non-compliance with, or appropriate objection to, subpoenas (as between parties to litigation and non-party records custodians).

9. To preserve the convenience to the parties and especially to the health care industry of the existing records custodian's affidavit procedure in lieu of attendance at trial or depositions, for authentication of records and qualification under the business records exception to hearsay. [Note: we recognize that both the current version of ORCP 55 and anything we replace it with will have the flaw that they cannot actually effectuate an exception to the hearsay rule, because the custodian's affidavit of authenticity is itself subject to a hearsay objection which it would be outside of the scope of the ORCP or the Council's jurisdiction to change. However, Oregon litigants and health care providers have become accustomed to reliance on the simulated exception to hearsay for records produced under a custodian's affidavit, and there does not seem to be pressing need to make it formally effective.]

The main thrust of our drafting has been to accomplish these goals by a slightly novel procedure in which the party seeking records serves on the party whose records are sought two documents to be served in turn by that party on the health care provider. One of the documents is a subpoena duces tecum describing the records sought, and the other is a consent form for their release, requiring signature by the patient or person able to consent to release of the records. The party whose records are sought is then required within limited time to obtain the required signature and serve both documents on the identified health care providers, along with a form of instructions provided in the rule, or as to all or part of the materials sought by the documents, serve written ORCP 43B objections on the party seeking them.

The draft rule and the instruction sheet to the health care providers contemplate the provider packaging the specified number of sets of the requested records in separate sealed envelopes addressed to the parties indicated in the documents, and sending them all (in one package) to the party (i.e., attorney for the party) whose records they are. A separate limited time period is provided for the patient's attorney to inspect its copy of the records before either forwarding the

sealed copies to the seeking party(s), or turning the sealed set(s) over to the court for in camera inspection in response to any objections now raised against production of specific contents.

Drafting decisions still need to be made about whether and how to lift the details of the custodian's affidavit contents and instructions from existing ORCP 55H, making sure that method will work for non-hospital records subject to these rules, and where the final rules should reside as between ORCP 44 and ORCP 55. Hopefully the forthcoming draft will have at least one suggestion for these answers incorporated for the subcommittee's consideration.

One other possibly ominous note needs mention: in the last two months the Clinton Administration has proposed sweeping new regulations adopted from a private health interest coalition entitled the Health Privacy Project. Published summaries of the proposal suggest it probably has numerous implications for the work of our subcommittee, although I notice it contemplates and expressly avoids pre-emption of "stronger" (i.e., more privacy-protective) state laws. Obviously we will have to become acquainted with the details of the proposed regulation and decide before we waste too much time going our own way whether it leaves room and need for our work to proceed. I am enclosing a summary from the Internet as a preview of the new regulation.

Please call or talk to me at the Council meeting on January 8th with any questions or concerns about this information.

Very truly yours,

GAYLORD & EYERMAN, P.C.

William A. Gaylord

WAG:jki

Enclosure

cc: Mick Alexander, Chair, Council on Courts Procedure (via fax)

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January 27, 2000

To: Rules 44/55 Subcommittee:
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Lisa C. Brown
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Fm: Maury Holland M.J.H.

Re: A Suggestion re Medical and Hospital Records

A thought has occurred to me which might, or might not, be of some use to your subcommittee. My thought is, whenever the medical or hospital records being sought are those of a party, would it not simplify things if the rules were amended to provide that a document request under ORCP 43 is either the exclusive means by which such records may be obtained, or if that is too strong, perhaps the method which must be used first before a subpoena directed to the custodian may be resorted to?

I understand, of course, that Rule 43 document requests may be directed only to a party. But how often does it happen that medical or hospital records of a non-party are sought? You will know better than I, but my sense is that, in the overwhelming majority of cases, records only of parties are subject to discovery. To cover the rare instances where records of a non-party are sought, Rule 55, particularly H and I, would have to remain available for use in cases where such records are sought.

If all requests for records of parties were funneled through Rule 43, would that not vastly simplify things and solve many of the problems mentioned in Bill's Jan. 7 letter? There would be no disclosure of records until the party (i.e., the attorney) had a chance to inspect them and lodge objections to the requests to the extent they sought copies of records that are privileged, assertedly beyond the scope of discovery, or protected by federal or state privacy regulations. Note that, pursuant to 43 B, a party could not withhold any requested records, or any portion of them, without stating the grounds for withholding them, which would put the requesting party on notice that some records, or portions of them, were being withheld and the reasons therefor.

Would records obtained in this way be admissible in evidence at trial? While I haven't researched the point, my guess is that the answer is yes, but you folks will almost certainly know for sure. At the least, would they not be admissible for purposes of impeachment?

My understanding from Bill's letter and comments I've heard over many years is that one problem plaguing this area is that different records subpoenas or requests often elicit different responses. Would not funneling all medical and hospital records discovery regarding parties through Rule 43 solve, or at least hugely mitigate, this problem? That is, would not the party which had furnished certain records in response to a properly worded request be precluded from then at trial attempting to introduce additional or different records? Could not the party which requested the records object to

the introduction at trial of different or additional records, and even to any testimony based on additional or different records? I'd think so.

In addition to other problems about this suggestion of which I might well be unaware, I realize that my suggestion would raise at least one problem, although I think it could be solved. That problem is that, under 43 A, requests can only be made for documents, etc., "which are in the possession, custody, or control of the party upon whom the request is served; . . . ."

My understanding is that medical records, while usually not in the possession or custody of the patient/party, are certainly in his or her control, in the sense that the patient, and no one else, can get originals or copies of them for the asking.

I'm not so sure about hospital records, but, again, one or more of you will certainly know what their legal status is. My inexpert understanding is that, unlike medical records, hospital records are the property of the hospital. But are they not "in the control" of the patient in the sense that he or she can obtain copies of them for the asking, at least upon paying a copying fee? If so, that should suffice to satisfy the "in the control" requirement. Possibly a clarifying amendment to 43 A might be necessary or helpful.

If 90% or more of efforts to obtain discovery of medical or hospital records were funneled through Rule 43 document requests, think of the enormous hassle that health care providers and hospital records custodians would be spared. Health care providers and hospital management would call the name of the Council forever blessed, and might even give us some money for John McMillan's treasury. Over time the savings could run into the millions. Just a 10% commission on those savings could probably pay the cost of sending the entire Council on a month-long research jaunt to see how discovery of medical and hospital records is handled on the French Riviera. It seems to me it would also give full protection both to parties whose records are sought and to parties seeking them.

Just a thought, which might, or might not, be worth the paper it's written on.

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DATE: April 5, 2000
TIME: 10: 45 a.m. (PDT)

DOCUMENTS	NUMBER OF PAGES*
agenda item for 4/8/00 meeting from ORCP44/55 Subcommittee	15

COMMENTS:
Original will NOT follow.

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FINAL WORKING DRAFT - 4/3/00

Amendments to ORCP 44

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

A. Order for Examination.

[text unchanged]

B. Report of Examining Physician or Psychologist.

[text unchanged]

~~**C. Reports of Examinations; Claims for Damages for injuries.** [delete text of section in its entirety]~~

C. Health Care Records.

C(1) As used in this rule, "health care records" means medical records as defined in ORS

192.525(8), and health care records of a health care provider as defined in ORS 192.525(9) and (10), and health care records of a community health program established under ORS 430.610 through 430.695.]

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

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

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

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

facility.[3]

~~**D. Report; Effect of Failure to Comply.** [delete section in its entirety]~~

~~**E. Access to Hospital Records.** [delete section in its entirety]~~

* * * * * * *

~~Amendments to ORCP 55 H~~

RULE 55. SUBPOENA

[A. through G. unchanged.]

H. Pretrial subpoena of Health Care Records from health care provider or facility.

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

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

H(2) Except when it is provided with a voluntary written consent to release of the health care records pursuant to ORCP 44C(2)(b), any party against whom a civil action is filed for

damages for injuries to the party or to a person in the custody or under the legal control of a party, or for damages for the death of a person whose estate is a party, may obtain copies of health care records within the scope of discovery under Rule 36 B directly from a health care provider or facility only by serving upon the party whose health care records, or whose decedent's health care records are sought:[4]

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

(b) simultaneously, an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS in the form provided by ORS 192.525(3), on which the following information has been designated with reasonable particularity: the name of the health care provider or providers or facility or facilities from which records are sought, the categories or types of records sought, and the time period, treatment, or claim for which records are sought. If the name of a health care provider or facility is unknown to the party seeking records, they may designate "all" health care providers or facilities, or "all" of them within a described category. The AUTHORIZATION shall designate the attorney for the party whose records are sought, or that party if unrepresented, as the persons to whom the records are released.[5]

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

sought shall:

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

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

or

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

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

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

H(5) Upon serving an objection to part or all of a SUBPOENA and AUTHORIZATION pursuant to subsection (2)(b) above, the objecting party may seek an order limiting extent of

disclosure, pursuant to ORCP 36C.[7]

H(6) *Statement of instructions.* Along with a SUBPOENA and AUTHORIZATION for health care records directly from a health care provider or facility hereunder, the party whose records are sought shall prepare and serve on the hospital or health care provider with the AUTHORIZATION the following STATEMENT OF INSTRUCTIONS:[8]

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

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

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

(b) In order to comply with this Authorization and these instructions, please make ____ copies of the designated records, place each copy in a separately sealed package bearing the address and postage to each of the names identified above , and place all of them together in one package or shipment, and mail that package within 5 days of this date to the person whose

records are sought or their representative, whose name and address are listed first above. Only _____ [name of person or their attorney whose records are sought] is authorized to receive the copies of these records directly from you. [9]

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

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

H(7)(a) ~~[H(2)(a)]~~ ~~[Existing 55H(2)(a) as is with these same changes of terminology.]~~ Except as provided in subsection ~~[(4)]~~ (9) of this section, when a subpoena is

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

H(7)(b) ~~[H(2)(b)]~~ ~~[Existing 55H(2)(b) modified consistent with STATEMENT OF INSTRUCTIONS in H(6) above]~~ The cop~~[y]~~ies of the records shall be separately enclosed in ~~[a]~~ sealed envelopes or wrappers on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelopes or wrappers shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed to the person whose records are sought or their representative, whose name and address are listed in the STATEMENT OF INSTRUCTIONS, pursuant to section H(6)(a)(ii) herein. ~~[as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena.]~~

H(8) ~~[H(3)]~~ *Affidavit of Custodian of Records.*

H(8)(a) ~~[H(3)(a)]~~ The records described in this section shall be accompanied by the affidavit of the custodian of the health care ~~[hospital]~~, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the cop~~[y]~~ies are ~~[is]~~ true cop~~[y]~~ies of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the ~~[hospital, staff physicians or persons acting under the control of either]~~ health care provider , in the ordinary course of ~~[hospital]~~ its business, at or near the time of the act, condition, or event described or referred to therein.

H(8)(b) ~~[H(3)(b)]~~ If the ~~[hospital]~~ health care provider has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(8)(c) ~~[H(3)(c)]~~ When more than one person has knoweldge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(9) ~~[H(4)]~~ *Personal Attendance of Custodian of Records May Be Required.*

H(9)(a) ~~[H(4)(a)]~~ the personal attendance of a custodian of health care ~~[hospital]~~ records and the production of original health care ~~[hospital]~~ records is required if the subpoena

duces tecum contains the following statement:

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

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

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

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

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

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

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

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

* * * * * * *

Amendments to 55I

RULE 55

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

I(1) Notwithstanding Rule 55H, a subpoena of health care records to trial may be served directly on the health care facility or its health care records custodian by the party seeking the health care records without an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS described at Rule 55H(2)(b) above, or a STATEMENT OF INSTRUCTIONS described at Rule 55H(6) above.

I(1)(a) Except as indicated in section I(2), it is sufficient compliance with such a subpoena if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt thereof, sealed in an envelope addressed

to the clerk of the court where the action is pending, accompanied by an affidavit described in ORCP 55H (8). The copy may be photographic or micro photographic. The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the health care provider or facility, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope shall be addressed to the clerk of the court, or to the judge if there is no clerk.

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

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

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

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

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

Also, subsection b was added recently to make sure we are not foreclosing practitioners from exchanging a signed release form from the patient which allows another party to seek the records themselves, as is sometimes done. When that method is not agreeable to the patient or its attorney, or is not sufficient to spring loose the records in the eyes of the provider, or is not adequately certain to get the full records in anyone's mind, the rest of these rules may be invoked.

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

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

5. *An obvious question may be asked: Why does this use both a subpoena and a "release" to get the records. The answer is that the subcommittee wants both the automatic enforcement mechanisms of the subpoena power, (without the need to invent new mechanisms, or connect into other existing ones), and the additional detailed instructions we are more comfortable placing in the release document. Additionally, combining the two instruments ought to lay to rest any lingering uncertainty among providers about whether a subpoena or a release gives them the broader authority/requirement to comply. Some practitioners have had providers balk at releasing records either because no subpoena or no release signed by the patient had accompanied the request. This may stem from interpretations of the federal statutes protecting certain mental health records, drug records, and perhaps AIDS testing records, which seem to*

require written consent of the patient regardless of subpoena.

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

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

8. *Re: 55H(6): The reason for this additional instructional enclosure is our recognition of the difficulty using rules of civil procedure, which by their nature apply to parties but not strangers to the litigation, to force non-parties to do something. It is not out of the question to make these same instruction into rules mandating action by the recipient of the subpoena, if anyone is concerned that medical providers will resist or fail to comply with these steps.*

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

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

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

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

FINAL WORKING DRAFT - 4/3/00

Amendments to ORCP 44:

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

A. Order for examination.

[text unchanged]

B. Report of examining physician or psychologist.

[text unchanged]

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

C. Health Care Records.

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

SECOND VERSION

community health program established under ORS 430.610 through 430.695.]

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

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

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

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

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

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

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

* * * * * * *

Amendments to ORCP 55 H.

RULE 55. SUBPOENA

[A. through G. unchanged.]

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

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

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

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

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

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

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

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

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

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

or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

subpoena.[10]

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

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

sought or their representative, whose name and address are listed in the STATEMENT OF INSTRUCTIONS, pursuant to section H(6)(a)(ii) herein. ~~[as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena.]~~

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

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

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

H(8)(b) ~~[H(3)(b)]~~ If the ~~[hospital]~~ **health care provider** has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(8)(c) ~~[H(3)(c)]~~ When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(9) ~~[H(4)]~~ *Personal attendance of custodian of records may be required.*

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

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

deemed sufficient compliance with this subpoena.

H(9)(b) ~~[H(4)(b)]~~ If more than one subpoena duces tecum is served on a custodian of ~~[hospital]~~ **health care provider** records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

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

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

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

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

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

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

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

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

* * * * * * *

Amendments to 55 I

RULE 55

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

flagpole".

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

FINAL WORKING DRAFT - 4/3/00

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

Amendments to ORCP 44:

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

A. Order for examination.

(text unchanged)

B. Report of examining physician or psychologist.

(text unchanged)

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

C. Health Care Records.

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

care records of a health care provider as defined in ORS 192.525(9) and (10), and health care records of a community health program established under ORS 430.610 through 430.695.

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

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

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

C(3) *Pretrial discovery of health care records directly from health care provider or facility.* Health care records within the scope of discovery under Rule 36 B may be obtained by a party against whom a civil action is

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

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

[E. Access to hospital records. (delete section in its entirety)]

* * * * *

Amendments to ORCP 55 H.

RULE 55. SUBPOENA

(A. through G. unchanged.)

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

[H(1) Hospital. (existing text deleted entirely)]

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

NOTE: The basic existing language in H(2), H(2)(a), H(2)(b), H(2)(c) and H(2)(d) is now contained in H(7) with appropriate changes.

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

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

H(2)(b) simultaneously, an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS in the form provided by ORS 192.525(3), on which the following information has been designated with reasonable particularity: the name of the health care provider or providers or facility or facilities from which records are sought, the categories or types of records sought, and the time period, treatment, or claim for which records are sought. If the name of a health care provider or facility is unknown to the party seeking records, they may designate "all" health care providers or facilities, or "all" of them within a described category. The AUTHORIZATION shall designate the attorney for the party whose records are sought, or that party if unrepresented, as the persons to whom the records are released.[5];

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

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

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

or

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

H(3)(b) as to any part of the SUBPOENA and AUTHORIZATION to which it does object, serve a written objection pursuant to ORCP 43 B on the party seeking the discovery.[6]

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

H(5) Upon serving an objection to part or all of a SUBPOENA and AUTHORIZATION pursuant to subsection (2)(b) above, the objecting party may seek an order limiting

extent of disclosure, pursuant to ORCP 36 C.[7]

H(6) *Statement of instructions.* Along with a SUBPOENA and AUTHORIZATION for health care records directly from a health care provider or facility hereunder, the party whose records are sought shall prepare and serve on the hospital or health care provider with the AUTHORIZATION the following STATEMENT OF INSTRUCTIONS:[8]

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

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

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

H(6)(b) In order to comply with this Authorization and these instructions, please make copies of the designated records, place each copy in a separately sealed package bearing the address and postage to each of the names identified above, and place all of them together in one package or shipment, and mail that package within five (5) days of this date to the person whose records are sought or their representative, whose name and address are listed first above. Only _____ (name of person or their attorney whose records are sought) is authorized to receive the copies of these records directly from you.[2]

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

H(7) *Mode of Compliance.* [The following is the existing first paragraph of 55 H(2) verbatim, but with "hospital records" changed to "health care records" and "hospital" changed to "health care provider" and "pretrial" added] *[Hospital]* **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.[10]

H(7)(a) (The following is existing language in 55 H(2)(a) with the same changes in terminology and additional appropriate language changes; the reference to subsection (3) has been changed to subsection (8).) Except as provided in subsection *[(4)]* **(9)** of this section, when a subpoena is served upon a custodian of *[hospital]* **health care** records in an action in which the *[hospital]* **health care provider** is not a party, and the subpoena requires the production of all or part of the records of the *[hospital]* **health care provider** relating to the care or treatment of a patient *[at]* **of** the *[hospital]* **health care provider**, it is sufficient compliance therewith if a custodian delivers by mail or otherwise *[a]* **the number of** true and correct *[copy]* **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 *[copy]* **copies** may be photographic or microphotographic reproduction.

H(7)(b) (The following is existing language in 55 H(2)(b) modified consistent with STATEMENT OF INSTRUCTIONS in H(6) above.) The *[copy]* **copies** of the records shall be separately enclosed in *[a]* sealed envelope**s** or wrapper**s** on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope**s** or wrapper**s** 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 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]* **to the person whose records are sought or their representative, whose name and address are listed in the STATEMENT OF INSTRUCTIONS, pursuant to section H(6)(a)(ii) herein.**

H(8) (Title of existing H(3)) ***Affidavit of custodian of records.***

H(8)(a) (The following is existing language in existing H(3)(a) with appropriate changes.) The records described in this section shall be accompanied by the affidavit of the custodian of the *[hospital]* **health care provider**, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the [copy is a] **copies are** true *[copy]* **copies** of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the *[hospital, staff physicians or persons acting under the* control *of either]* **health care provider**, in the ordinary course of *[hospital]* **its** business, at or near the time of the act, condition, or event described or referred to therein.

H(8)(b) (The following is existing language in H(3)(b) with appropriate changes.) If the *[hospital]* **health care provider** has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(8)(c) (The following is existing language in H(3)(c).)

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

H(9) (Existing title of H(4)) ***Personal attendance of custodian of records may be required.***

H(9)(a) (The following is existing language in H(4)(a) with appropriate changes.) The personal attendance of a custodian of *[hospital]* **health care provider** records and the production of original *[hospital]* **health care provider** records is required if the subpoena duces tecum contains the following statement:

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

H(9)(b) (The following is existing language in H(4)(b) with appropriate changes.) If more than one subpoena duces tecum is served on a custodian of *[hospital]* **health care provider** records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

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

H(10) ***Fees for copies.*** **A health care provider may charge a reasonable fee for responding to a release authorization or subpoena for health care records. A reasonable fee for copying and providing such records shall not exceed twenty-five cents ($0.25) per page, less any prepaid witness fee, in the absence of personal attendance by the custodian of the records.**[11]

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

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

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

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

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

* * * * *

Amendments to 55 I

RULE 55

[Medical Records] [Note: all of existing 55 I is deleted, though not shown here][12]

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

I(1) Notwithstanding Rule 55 H, a subpoena of health care records to trial may be served directly on the health care facility or its health care records custodian by the party seeking the health care records without an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS described at Rule 55 H(2)(b) above, or a STATEMENT OF INSTRUCTIONS described at Rule 55 H(6) above.

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

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

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

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

* * * * *

NOTES

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

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

action.

Also, subsection (b) was added recently to make sure we are not foreclosing practitioners from exchanging a signed release form from the patient which allows another party to seek the records themselves, as is sometimes done. When that method is not agreeable to the patient or its attorney, or is not sufficient to spring loose the records in the eyes of the provider, or is not adequately certain to get the full records in anyone's mind, the rest of these rules may be invoked.

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

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

under the old rules we are trying to replace.

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

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

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

8. *Re: 55 H(6): The reason for this additional instructional enclosure is our recognition of the difficulty using rules of civil procedure, which by their nature apply to parties but not strangers to the litigation, to force non-parties to do something. It is not out of the question to make these same instructions into rules mandating action by the recipient of the subpoena if anyone is concerned that medical providers will resist or fail to comply with these steps.*

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

10. *Re: 55 H (7): This section, with slight word changes, is preserved from the Council's recent amendments to*

solve problems medical providers had with apparent inconsistencies between our rule and federal protections of certain medical records. We should not have to re-hash that recent work.

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

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

For Distribution at 4-8-00 Council Meeting
ORCP 44/55 Amendments

Full Text of Rules 44 and 55 showing amendments proposed thereto by Rules 44/55 Subcommittee. {{Matter to be added in **bold underlined;** to be deleted in [*italics enclosed in square brackets.*] When matter in ***bold is italicized*** **or not underlined**, or when matter is shown in *italics* not enclosed in square brackets, that is because it is what is called for by conventional ORCP style. There will be a quiz on this!}}

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

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

B. Report of Examining Physician or Psychologist. If requested by the party against whom an order is made under section A of this rule or the person examined, the party causing the

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

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

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

(a) serving a request for production of such records on the injured party or its legal custodian or guardian pursuant to ORCP[3] 43; or

(b) obtaining the voluntary written consent to

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[1]A title word, such as "*Definitions*," is needed here.

[2]For stylistic consistency, this should be "**under section B of Rule 36 . . .**"

[3]For stylistic consistency, this should be "**pursuant to Rule 43; . . .**"

release of the records to such party from the injured party or its legal custodian or guardian before seeking them from the health care provider.

C(3) *Pretrial discovery of Health Care Records*[4] *directly from health care provider or facility.* Health care records within the scope of discovery under Rule 36 B[5] may be obtained by a party against whom a civil action is filed for damages for injuries to the party or to a person in the custody or under the legal control of a party, or for damages for the death of a person whose estate is a party, only by the procedure described in section (2)(b)[6] above, or by the procedures described in ORCP 55 H,[7] Pretrial subpoena of Health Care Records[8] from health care provider or facility.

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[4]This should be "*health care records . . .*"

[5]See note 2 above.

[6]For stylistic consistency, this should be "in paragraph (2)(b) above, . . ." unless what is intended is "subsection C(2) above, . . ."

[7]For stylistic consistency, this should be "in section H of Rule 55, . . ."

[8]Stylistically, this should be "pretrial subpoena of health care records . . ."

[*D. Report; Effect of Failure to Comply.*]

[*D(1) Preparation of Written Report. If an obligation to furnish a report arises under sections B or C of this rule and the examining physician or psychologist has not made a written report, the party who is obliged to furnish the report shall request that the examining physician or psychologist prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examiner's fee, necessary to prepare such a report.*]

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

[*E. Access to Hospital Records. Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of all records of any hospital in reference to and connected*

with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B. Hospital records shall be obtained by subpoena in accordance with Rule 55 H.]

RULE 55. SUBPOENA

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

B. For Production of Books, Papers, Documents, or

Tangible Things and to Permit Inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things but not commanded to also appear for deposition, hearing or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents or tangible things the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the

motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance.

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

issued by the judge, justice, or other officer before whom the attendance is required.

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

D. Service; Service on Law Enforcement Agency; Service by Mail; Proof of Service.

D(1) *Service.* Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, whether or not personal attendance is required, one day's attendance fees. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before

trial, not accompanied by command to appear at trial or hearing or at deposition, whether the subpoena is served personally or by mail, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

D(2) *Service on Law Enforcement Agency.*

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

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

D(2)(c) When a subpoena has been served as provided in

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

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

D(3) *Service by Mail.*

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

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

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

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

more than three days prior to trial.

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

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

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

F. Subpoena for Taking Depositions or Requiring

Production of Books, Papers, Documents, or Tangible Things; Place of Production and Examination.

F(1) *Subpoena for Taking Deposition.* Proof of service of a notice to take a deposition as provided in Rules 39 C and 40 A, or of notice of subpoena to command production of books, papers, documents, or tangible things before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein.

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

F(3) *Production Without Examination or Deposition.* A party who issues a subpoena may command the person to whom it is issued,

other than a hospital, to produce books, papers, documents, or tangible things by mail or otherwise, at a time and place specified in the subpoena, without commanding inspection of the originals or a deposition. In such instances, the person to whom the subpoena is directed complies if the person produces copies of the specified items in the specified manner and certifies that the copies are true copies of all the items responsive to the subpoena or, if all items are not included, why they are not.

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

H. [*Hospital Records.*] **Pretrial subpoena of Health Care Records from health care provider or facility.**[9]

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

[9]Stylistically, this should be: "**Pretrial Subpoena of Health Care Records from Health Care Provider or Facility.**"

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(1)[10] [*Hospital.*] **For purposes of this section "health Care**[11] **records" are defined in ORCP 44 C(1).**[12]

[*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.*][13]

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[10]A title word in italics, such as "*Definition,* is needed here.

[11]Should be "**care . . .**"

[12]Stylistically should be "**in subsection C(1) of Rule 44.**"

[13]**Note that existing H(2) is revised and renumbered H(7).**

[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.][14]

[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

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[14]**Note that existing H(2)(a) is revised and renumbered H(7)(a).**

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.][15]

[*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 subsection (3) of section D of this rule.*] **{{QUERY--H(2)(c) and (d) appear to be deleted without being renumbered or revised elsewhere, but I'm not sure.}}**

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[15]**Note that existing H(2)(b) is revised and renumbered H(7)(b).**

H(2)[16] Except when it is provided with a voluntary written consent to release of the health care records pursuant to ORCP 44 C(2)(b),[17] any party against whom a civil action is filed for damages for injuries to the party or to a person in the custody or under the legal control of a party, or for damages for the death of a person whose estate is a party, may obtain copies of health care records within the scope of discovery under Rule 36 B[18] 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:

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

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

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[16]An italicized title word is needed here.

[17]Stylistically this should be "paragraph C(2)(b) of Rule 44, . . ."

[18]Stylistically this should be "under section B of Rule 36 . . ."

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 person to whom the records are released.

[*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(3)[19] Within 14 days after receipt of service of such a SUBPOENA and AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS, a party whose records are sought shall:

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

(i) return it to the requesting party for its use in obtaining records directly from the health care provider(s) or facility(s).[20]

or

(ii) serve the SUBPOENA and AUTHORIZATION by mail on the health care provider or providers or facility or facilities indicated, along with the STATEMENT OF INSTRUCTIONS provided in section 3[21] below; and

(b) as to any part of the SUBPOENA and AUTHORIZATION

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[19]An italized title word is needed here.

[20]Correct to "facility(ies)" or "facility or facilities."

[21]I'm not sure what "section 3 below" refers to.

to which it does object, serve a written objection pursuant to ORCP 43B[22] on the party seeking the discovery.

[*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(4)[23] Upon receipt of an objection to all or part of a SUBPOENA and AUTHORIZATION pursuant to subsection[24] above, the party issuing the SUBPOENA and AUTHORIZATION may seek

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[22]Should be corrected to "**section B of Rule 43**."

[23]Title word or line in italics needed here.

[24]Should be corrected to "**paragraph**."

an order compelling discovery, pursuant to ORCP[25] 46.

[*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.*]

H(5)[26] Upon serving an objection to part or all of a SUBPOENA and AUTHORIZATION pursuant to subsection[27] (2)(b) above, the objecting party may seek an order limiting extent of disclosure pursuant to ORCP 36 C.[28]

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

(a) Enclosed with this STATEMENT OF INSTRUCTIONS is a statutory SUBPOENA and AUTHORIZATION TO DISCLOSE MEDICAL

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[25]Correct "**ORCP**" to "**Rule**."

[26]An italized title word or line is needed here.

[27]Correct "**subsection**" to "**paragraph**."

[28]Correct to "**section C of Rule 36**."

RECORDS pursuant to ORS 192.525(3) which has been signed by a person able to consent to the release of the requested records or authorized by law to obtain the records. Copies of the designated records are sought by each of the following parties:

i [name and address of person whose records are sought, or their[29] attorney

ii.[name and address of each other party or their[30] who seeks access to the records

(b) In order to comply with this Authorization and these instructions, please make _____ copies of the designated records, place each copy in a separately sealed package bearing the address and postage to each of the names identified above, and place all of them together in one package or shipment, and mail that package within 5 days of this date to the person whose records are sought or their representative, whose name and address are listed first above. Only [name of person or their[31] attorney whose records are sought] is authorized to receive the copies of these records directly from you.

(c) The STATEMENT OF INSTRUCTIONS shall be signed

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[29]Correct to "his or her."

[30]See note 29 above.

[31]See note 29 above.

by the party whose records are sought, or their[32] attorney, and a copy served with a certificate of service pursuant to ORCP 9C[33] on each party, or their[34] attorney, seeking discovery of the health care records.

H(7) *Mode of Compliance.* Health care records may be obtained by subpoena pretrial[35] 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 requirement of the pertinent law have been complied with and such compliance is evidenced throught[36] 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 response to the subpoena. If any appropriate consent or court order does accompany the subpoena, the production of all records requested shall be considered

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[32]See note 29 above.

[33]Should correct to "section C of Rule 9."

[34]See note 29 above.

[35]"[P]retrail" is double underlined to indicate that the subcommittee draft indicates it should be underlined in the final text version. Why?

[36]Correct to "through."

509 production of the records responsive to the subpoena.[37]

510 H(7)(a) Except as provided in subsection 9 of this
511 section, when a subpoena is served upon a custodian of
512 health care records in an action in which the health care
513 provider is not a party, and the subpoena requires the
514 production of all or part of the records of the health
515 care provider relating to the care or treatment of a
516 patient of the health care provider, it is sufficient
517 compliance therewith if a custodian delivers by mail or
518 otherwise the number of true and correct copies of all the
519 records responsive to the subpoena indicated in in the
520 subpoena or statement of instructions, within five days
521 after receipt thereof. Delivery shall be accompanied by
522 the affidavit described in subsection (8) of this section.
523 The copies may be photographic or microphotographic
524 reproduction.[38]

525 H(7)(b) The copies of the records shall be separately

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[37]Proposed H(7) is identical to existing H(2) except that in line 495 "hospital records" is changed to "health care records."

[38]Proposed H(7)(a) is identical with existing H(2)(a) with the following changes: in line 510 "subsection (9)" is substituted for "subsection (4)"; in line 512 "health care records" is substituted for "hospital records"; in lines 512-13, lines 514-15, and line 516 "health care provider" is substitued for "hospital"; in line 516 "patient at" is changed to "patient of"; in line 518 "a true and correct copy of all the records responsive" is changed to "the number of true and correct copies of all the records responsive to"; in lines 519-20 "indicated in the subpoena or statement of instructions," is added following "responsive to the subpoena" and before "within five days after receipt thereof"; in line 522 "subsection (3)" is changed to "subsection (8)"; and in line 523 "copies" is substituted for "copy."

enclosed in sealed envelopes or wrappers on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelopes or wrappers shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed to the person whose records are sought or their representative, whose name and address are listed in the STATEMENT OF INSTRUCTIONS, pursuant to section[39] H(6)(a)(ii) herein.[40]

H(8) *Affidavit of Custodian of Records.*[41]

H(8)(a) The records described in this section shall be accompanied by the affidavit of the custodian of the health care[42] 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

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[39]Should be corrected to "subparagraph (6)(a)(ii) of this section."

[40]Proposed H(7)(b) is identical to present H(2)(b) except for the following changes: In line 525 "The copies of the records" is substituted for "The copy of the records"; in line 526 "sealed envelopes or wrappers" is substituted for "a sealed envelope or wrapper"; in lines 531-34 "to the person whose records are sought or their representative, whose name and address are listed in the STATEMENT OF INSTRUCTIONS, pursuant to section H(6)(a)(ii) herein" are inserted between "The outer envelope or wrapper shall be addressed" and "as follows"; and all language from and including "as follows: (i) . . ." are deleted.

[41]This title line is from the present H(3).

[42]Add "provider" after "health care" in line 538.

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.[43]

H(8)(b) If the health care provider has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.[44]

H(8)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.[45]

H(9) *Personal Attendance of Custodian of Records May Be Required.*[46]

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

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[43]Proposed H(8)(a) is identical to existing H(3)(a) except for the following changes: "health care [provider]" is substituted for "hospital" in line 538, "the copies are true copies" is substituted for "the copy is a true copy" in line 541, "health care provider" is substituted for "hospital, staff physicians or persons acting under the control of either" in line 543, and "its" is substituted for "hospital" in line 544.

[44]Proposed H(8)(b) is identical to existing H(3)(b) except that "health care provider" is substituted for "hospital" in line 546.

[45]Proposed H(8)(c) is identical to existing H(3)(c).

[46]This title line is identical to existing H(4).

557 care records is[47] required if the subpoena duces tecum
558 contains the following statement:
559 The personal attendance of a custodian of health
560 care records and the production of original records is[48]
561 required by this subpoena. The procedure authorized by
562 Oregon Rule of Civil Procedure 55 H(7) and (8) shall not
563 be deemed sufficient compliance with this subpoena.[49]
564 H(9)(b) If more than one subpoena is served on a
565 custodian of health care records and personal attendance
566 is required under each pursuant to paragraph (a) of this
567 subsection, the custodian shall be deemed to be the
568 witness of the party serving the first such subpoena.[50]

569 H(10) *Fees for copies.* A health care provider may
570 charge a reasonable fee for responding to a release
571 authorization or subpoena for health care records. A
572 reasonable fee for copying and providing such records
573 shall not exceed twenty-five cents ($0.25) per page, less
574 any prepaid witness fee, in the absence of personal

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[47]Should be corrected to "are."

[48]See note 47 above.

[49]Proposed H(9)(a) is identical to existing H(4)(a) except for the following changes: "health care" is substituted for "hospital" in line 556-57, and in lines 559-60.

[50]Proposed H(9)(b) is identical to present H(4)(b) except that "health care" is substituted for "hospital" in line 565.

attendance by the custodian of the records.[51]

H(11) *Obligation of party or attorney of party whose health care records are received from health care provider pursuant to subpoena.* Upon receipt of the sealed copies of the health care records addressed to each of the parties seeking access to them, the party whose records are sought, or their[52] attorney, shall open only the copy addressed to that party or attorney, and shall have 14 days in which to review them. Not later than 14 days after receipt of the records from the health care provider or facility, the party whose records are sought shall either serve the unopened copies of the records on each party seeking them, or shall serve each such party with objections to their production pursuant to ORCP 43B.[53]

H(11)(a) *Privilege or objection log.*[54] 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

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[51]**Proposed H(10) would replace existing H(5).**

[52]See note 29 above.

[53]"ORCP 43B" should be corrected to "section B of Rule 43." **Proposed H(11) has no counterpart in existing 55 H.**

[54]For stylistic consistency, this italicized title line should probably be moved, since throughout the ORCP paragraphs do not have such lines.

that, without revealing information which is privileged or protected, will enable other parties to assess the applicability of the privilege or protection.[55]

H(11)(b) *In camera review.*[56] 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 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.[57]

H(12)[58] Nothing contained in this rule,[59] 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

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[55]Proposed H(11)(a) has no counterpart in existing 55 H.

[56]See note 54 above.

[57]Proposed H(11)(b) has no counterpart in existing 55 H. Query--should this provision for *in camera* review be expanded to apply when the motion is for a protective order quashing or limiting the scope of the subpoena?

[58]An italicized title line is needed here.

[59]"[S]ection" would probably be better than "rule" here.

specifically authorized, and to the parties to whom disclosure is specifically authorized under this section.[60]

H(13)[61] **Any health care records obtained pursuant to this rule**[62] **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.**[63]

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

[*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*

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[60]**Proposed H(12) has no counterpart in existing 55 H.**

[61]See note 58 above.

[62]See note 59 above.

[63]**Proposed H(13) has no counterpart in existing 55 H.**

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 ORS18.550, 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.]

I(1)[64] Notwithstanding Rule 55H,[65] a subpoena of health care records to trial may be served directly on the health

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[64]See note 58 above.

[65]Should be correction to "**Notwithstanding section H of this rule, . . .**"

care facility or its health care records custodian by the party seeking the health care records without an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS describe at Rule 55H(2)(b) above,[66] or a STATEMENT OF INSTRUCTIONS described at Rule 55H(6) above.[67]

I(1)(a) Except as indicated in section I(2),[68] 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 response to the subpoena within five days after receipt thereof, sealed in an envelope addressed to the clerk of the court where the action is pending, accompanied by an affidavit described in ORCP 55H(8).[69] 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

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[66]Should be corrected to "described in paragraph H(2)(b) of this rule, . . ."

[67]Should be corrected to "in subsection H(6) of this rule."

[68]Should be corrected to "in subsection (2) of this section, . . ."

[69]Should be corrected to "in subsection H(8) of this rule."

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

The personal attendance of a custodian of health care records and the production of the original records is[71] required by this subpoena. The procedures authorized by ORCP 44C or ORCP 55H[72] shall not be deemed sufficient compliance with this subpoena.

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[70]See note 58 above.

[71]See note 47 above.

[72]Should be corrected to "section C of Rule 44 or section H of this rule . . ."

COUNCIL ON COURT PROCEDURES

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May 3, 2000

TO: **CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Gilma Henthorne

RE: Proposed amendments to ORCP 44/55

Here is another copy of the proposed amendments to ORCP 44/55 to aid in your review and making comments on or before the date of the next Council meeting on **May 20**. One member mentioned that page 3 was missing from his set, so I am enclosing a complete copy for each of you in the event you are missing page 3 or any other pages.

Enc.

FINAL WORKING DRAFT - 4/3/00

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

Amendments to ORCP 44:

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

A. Order for examination.

(text unchanged)

B. Report of examining physician or psychologist.

(text unchanged)

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

C. Health Care Records.

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

care records of a health care provider as defined in ORS 192.525(9) and (10), and health care records of a community health program established under ORS 430.610 through 430.695.

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

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

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

C(3) *Pretrial discovery of health care records directly from health care provider or facility.* Health care records within the scope of discovery under Rule 36 B may be obtained by a party against whom a civil action is

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

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

[E. Access to hospital records. (delete section in its entirety)]

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Amendments to ORCP 55 H.

RULE 55. SUBPOENA

(A. through G. unchanged.)

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

[H(1) Hospital. (existing text deleted entirely)]

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

NOTE: The basic existing language in H(2), H(2)(a), H(2)(b), H(2)(c) and H(2)(d) is now contained in H(7) with appropriate changes.

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

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

H(2)(b) simultaneously, an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS in the form provided by ORS 192.525(3), on which the following information has been designated with reasonable particularity: the name of the health care provider or providers or facility or facilities from which records are sought, the categories or types of records sought, and the time period, treatment, or claim for which records are sought. If the name of a health care provider or facility is unknown to the party seeking records, they may designate "all" health care providers or facilities, or "all" of them within a described category. The AUTHORIZATION shall designate the attorney for the party whose records are sought, or that party if unrepresented, as the persons to whom the records are released.[5];

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

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

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

or

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

H(3)(b) as to any part of the SUBPOENA and AUTHORIZATION to which it does object, serve a written objection pursuant to ORCP 43 B on the party seeking the discovery.[6]

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

H(5) Upon serving an objection to part or all of a SUBPOENA and AUTHORIZATION pursuant to subsection (2)(b) above, the objecting party may seek an order limiting

extent of disclosure, pursuant to ORCP 36 C.[7]

H(6) *Statement of instructions.* Along with a SUBPOENA and AUTHORIZATION for health care records directly from a health care provider or facility hereunder, the party whose records are sought shall prepare and serve on the hospital or health care provider with the AUTHORIZATION the following STATEMENT OF INSTRUCTIONS:[8]

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

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

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

H(6)(b) In order to comply with this Authorization and these instructions, please make copies of the designated records, place each copy in a separately sealed package bearing the address and postage to each of the names identified above, and place all of them together in one package or shipment, and mail that package within five (5) days of this date to the person whose records are sought or their representative, whose name and address are listed first above. Only _____ (name of person or their attorney whose records are sought) is authorized to receive the copies of these records directly from you.[9]

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

H(7) *Mode of Compliance.* [The following is the existing first paragraph of 55 H(2) verbatim, but with "hospital records" changed to "health care records" and "hospital" changed to "health care provider" and "pretrial" added] *[Hospital]* **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.[10]

H(7)(a) (The following is existing language in 55 H(2)(a) with the same changes in terminology and additional appropriate language changes; the reference to subsection (3) has been changed to subsection (8).) Except as provided in subsection *[(4)]* **(9)** of this section, when a subpoena is served upon a custodian of *[hospital]* **health care** records in an action in which the *[hospital]* **health care provider** is not a party, and the subpoena requires the production of all or part of the records of the *[hospital]* **health care provider** relating to the care or treatment of a patient *[at]* **of** the *[hospital]* **health care provider**, it is sufficient compliance therewith if a custodian delivers by mail or otherwise *[a]* **the number of** true and correct *[copy]* **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 *[copy]* **copies** may be photographic or microphotographic reproduction.

H(7)(b) (The following is existing language in 55 H(2)(b) modified consistent with STATEMENT OF INSTRUCTIONS in H(6) above.) The *[copy]* **copies** of the records shall be separately enclosed in *[a]* sealed envelope**s** or wrapper**s** on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope**s** or wrapper**s** 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 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]* **to the person whose records are sought or their representative, whose name and address are listed in the STATEMENT OF INSTRUCTIONS, pursuant to section H(6)(a)(ii) herein.**

H(8) (Title of existing H(3)) ***Affidavit of custodian of records.***

H(8)(a) (The following is existing language in existing H(3)(a) with appropriate changes.) The records described in this section shall be accompanied by the affidavit of the custodian of the *[hospital]* **health care provider**, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the [copy is a] **copies are** true *[copy]* **copies** of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the *[hospital, staff physicians or persons acting under the* control *of either]* **health care provider**, in the ordinary course of *[hospital]* **its** business, at or near the time of the act, condition, or event described or referred to therein.

H(8)(b) (The following is existing language in H(3)(b) with appropriate changes.) If the *[hospital]* **health care provider** has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(8)(c) (The following is existing language in H(3)(c).)

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

H(9) (Existing title of H(4)) ***Personal attendance of custodian of records may be required.***

H(9)(a) (The following is existing language in H(4)(a) with appropriate changes.) The personal attendance of a custodian of *[hospital]* **health care provider** records and the production of original *[hospital]* **health care provider** records is required if the subpoena duces tecum contains the following statement:

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

H(9)(b) (The following is existing language in H(4)(b) with appropriate changes.) If more than one subpoena duces tecum is served on a custodian of *[hospital]* **health care provider** records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

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

H(10) ***Fees for copies.*** **A health care provider may charge a reasonable fee for responding to a release authorization or subpoena for health care records. A reasonable fee for copying and providing such records shall not exceed twenty-five cents ($0.25) per page, less any prepaid witness fee, in the absence of personal attendance by the custodian of the records.[11]**

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

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

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

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

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

* * * * *

Amendments to 55 I

RULE 55

[Medical Records] [Note: all of existing 55 I is deleted, though not shown here][12]

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

I(1) Notwithstanding Rule 55 H, a subpoena of health care records to trial may be served directly on the health care facility or its health care records custodian by the party seeking the health care records without an AUTHORIZATION TO DISCLOSE HEALTH CARE RECORDS described at Rule 55 H(2)(b) above, or a STATEMENT OF INSTRUCTIONS described at Rule 55 H(6) above.

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

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

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

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

* * * * *

NOTES

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

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

action.

Also, subsection (b) was added recently to make sure we are not foreclosing practitioners from exchanging a signed release form from the patient which allows another party to seek the records themselves, as is sometimes done. When that method is not agreeable to the patient or its attorney, or is not sufficient to spring loose the records in the eyes of the provider, or is not adequately certain to get the full records in anyone's mind, the rest of these rules may be invoked.

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

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

under the old rules we are trying to replace.

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

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

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

8. *Re: 55 H(6): The reason for this additional instructional enclosure is our recognition of the difficulty using rules of civil procedure, which by their nature apply to parties but not strangers to the litigation, to force non-parties to do something. It is not out of the question to make these same instructions into rules mandating action by the recipient of the subpoena if anyone is concerned that medical providers will resist or fail to comply with these steps.*

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

10. *Re: 55 H (7): This section, with slight word changes, is preserved from the Council's recent amendments to*

solve problems medical providers had with apparent inconsistencies between our rule and federal protections of certain medical records. We should not have to re-hash that recent work.

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

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

COUNCIL ON COURT PROCEDURES

1221 University of Oregon
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Eugene, OR 97403-1221

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

4-15-2000

PUBLIC NOTICE

Enclosed for review is a draft of proposed amendments to ORCP 44 and ORCP 55. Comments may be jointly addressed to:

Mr. J. Michael Alexander
Chair, Council on Court Procedures
188 State Street, Suite 1000
Salem, OR 97301-3554

Mr. William A. Gaylord
Subcommittee Chair: ORCP 44 and ORCP 55 Subcommittee
GAYLORD & EYERMAN, P.C.
1400 Southwest Montgomery Street
Portland, OR 97201

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

The next meeting of the Council on Court Procedures will be held on Saturday, May 20, 2000, commencing at 9:30 a.m., at the Oregon State Bar Center, 5200 Southwest Meadows Road, Lake Oswego, Oregon. The proposed amendments to ORCP 44 and ORCP 55 will be the first agenda item for discussion at that time. Attendance by members of the public is invited.

Enclosures

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‡ Also Member of Washington Bar

RAYMOND F. MENSING, JR.
(1930-1999)

May 10, 2000

FACSIMILE TRANSMITTAL

SENDING TO:	Mr. J. Michael Alexander	(503)588-7179
	Mr. William A. Gaylord	228-3628
	Mr. Maurice J. Holland	(541)346-1564

SUBJECT: Proposed Amendments to ORCPs 44 & 55 Relating to Medical Records

FROM: Thomas E. Cooney

OUR FAX NO.: (503) 224-6740

COMMENTS: Attached please find my correspondence to you of this date regarding the above matter.

2 PAGES (INCLUDING THIS PAGE) ARE SENT.

[X] ORIGINAL TO FOLLOW BY MAIL

[ ] ORIGINAL NOT TO FOLLOW BY MAIL

[ ] ORIGINAL AVAILABLE FOR YOUR INSPECTION

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(1930-1999)

May 10, 2000

VIA FACSIMILE & U.S. MAIL

Mr. J. Michael Alexander
Burt Swanson Lathen
Alexander & McCann PC
388 State Street, Suite 1000
Salem, OR 97301

Mr. William A. Gaylord
Gaylord & Eyerman PC
1400 SW Montgomery Street
Portland, OR 97201

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

RE: Proposed Amendments to ORCPs 44 & 55 Relating to Medical Records

Gentlemen:

I've reviewed the proposed ORCP changes and I can tell you that having the physician's office make multiple copies of requested medical records and placing them in sealed envelopes, addressed to the various defendants will be strongly opposed by the medical profession. Physicians' offices currently are inundated with paperwork. In a case where a patient may have a large file and there may be multiple defendants, it would turn the physician's office into a photocopy center. If anybody is going to make the copies, it should be one of the parties' attorneys. I also see tremendous cost increases for both plaintiffs' and defense counsel under this system.

I can tell you the physicians' offices will be heavily burdened if this goes through.

Sincerely,

Thomas E. Cooney
(tecooney@pdxemail.com)

TEC:msb

F:\WP7\TTJMISC\HAGAN5.10

GAYLORD & EYERMAN, P.C.
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William A. Gaylord
Linda K. Eyerman
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Telephone: (503) 222-3526
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September 5, 2000

TRANSMITTED VIA FAX

J. Michael Alexander
Burt, Swanson, Lathen,
Alexander & McCann
Attorneys at Law
388 State Street, Suite 1000
Salem, Oregon 97301

RE: ORCP 44/55 proposed changes re: medical record subpoenas

Dear Mic:

I have been remiss in not proofreading the drafts of these proposed rule changes from Council staff sooner. Because of the short time until the pivotal meeting of the Council, I am going to fax my re-marked up copy of Gilma's drafts to her and to you today (enclosed), and then discuss how to get the re-drafts to the Council members, either by fax (but they are quite long) or by hand out at the meeting. I will try to inform the Council of the gist of these changes today by fax copies of this letter.

I believe each of the following further changes, in the order they appear in packet II, (with all my page and line references being to packet II of the materials circulated for the September 9 meeting) are necessary to reflect the subcommittee's intended proposals and alternatives:

1. In Gilma's photocopy of the existing unchanged parts of the rules, page 5 of packet II, rule 55F(3), in the first sentence, the phrase "other than a hospital" should be deleted, and after the phrase "or tangible things" the phrase "other than medical records" should be inserted. I think this is necessary to make clear that only 55H governs subpoenas of medical records, and to complete our effort to cover both kinds (physicians' office and hospital records) in the new rule. It has not been previously part of our proposal because we overlooked this reference to hospital records in F(3) until now.

2. On page 8, I am going to suggest that we undelete existing ***H(5) Tender and payment of fees*** and delete our proposed new ***Fees and copies*** section [which is H(10) of VERSION ONE, page 16, H(10) of VERSION TWO, page 25, H(8) of VERSION THREE, page 34, and H(8) of VERSION FOUR, page 43]. I have alluded to this each time the Council has talked about these rules. The problem I see is that the subcommittee's effort to control costs of medical records copies, while popular here, is likely to create an insurmountable political problem for these changes as a whole. We have been advised since publishing these proposals to interest groups that the Practice and Procedures Committee of the Bar made a valiant consensus

effort to pass a similar restriction in a recent legislative session, and ran into a firestorm of opposition from medical providers and copying services, armed with detailed analyses of records copying and handling costs. Your subcommittee chose to include this proposed limitation on costs to see what reaction it got. Based on the history that has been described to me by members of P & P, I believe it would be shortsighted to leave this paragraph in any rule we publish now for possible verbatim adoption or not in December.

3. Extrapolating from a suggestion Judge Marcus wrote to me before our last Council meeting, I propose the same language changes in three separate places in each of the four versions, at C(2), C(3), and 55H(2), as follows (p. 11, lines 33-35, p. 11 lines 53-55, p. 12 lines 102-104, p. 20 lines 32-34, p. 20 lines 52-54, p. 21 lines 104-106, p. 29 lines 31-34 (lines 31 and 32 are missing in my packet), p. 29 lines 52-54, p. 30 lines 98-100, p. 38 lines 32-34, p. 38 lines 52-54):

delete the language:

for injuries to the party or to a person in the custody or under the legal control of a party, or for damages for the death of a person whose estate is a party,

and replace it with:

to another party for injuries or death,

In addition, in all four versions, delete from C(2)(a) and C(2)(b) the word *injured* and insert in its place *damaged* (p. 11 line 41 and line 45, p. 20 line 40 and line 44, p. 29 line 40 and line 44, p. 38 line 40 and line 44).

The genesis of this set of changes is Judge Marcus' point that the phrase "the party" in the language I would delete causes a difficult "double take" while the reader tries to sort out to which of possible parties it refers. He suggested "another party" instead. I concluded that the concept of a claim for "damages" for injuries or death adequately covers the possibilities without having to spoon feed with the various ways a party's claim for damages may not be for their own personal injury, as our drafts and existing rules 44C and 44E have tried to do. All these sections are trying to do is to define the realm of personal injury and death litigation, as the kind of cases where all this access to medical records is intended to occur.

4. There is a typo in each version of the heading to rule 55H: the word ***"records"*** needs to be inserted after the first ***"health care"*** at p. 12 line 87, p. 21 line 89, p. 30 line 83, and p. 39 line 81.

5. The phrase "Each copy of" should be inserted at the beginning of 55H(8)(a) in VERSION ONE at p. 15, line 252. Frankly, I cannot remember where this change comes from

as a new insert in each of the other version, but it should be the same in all four, and is missing in comparison to the corresponding section of the other three.

6. There is a typo requiring the deletion of the word "provider" from the phrase "health care provider records" in H(9)(b) of VERSION ONE, p. 16 line 292, H(9)(b) of VERSION TWO, p. 25 line 296, H(7)(b) of VERSION THREE, p. 34 line 268, and H(7)(b) of VERSION FOUR, p. 42 line 264.

7. References to I(2)-I(4) on Gilma's photocopy of existing rules, p. 8-9 of the packet, and at p. 18 line 409, p. 27 line 414, p. 36 line 393, and p. 45 line 389 should all be deleted. All of 55I has either been rewritten elsewhere, replaced by new language, or found expendable in our proposals.

8. In VERSION THREE, H(4)(b) at p. 32 line 175 the word "two" should be deleted and replaced with a blank line. Only VERSION TWO and VERSION FOUR should have the limited number of two copies to be made and packaged by providers.

9. IN VERSION FOUR, the phrase "each other" need to be deleted and replaced with "the" in H(4)(a)(ii), p. 40 line 166; and the word "all" needs to be deleted and replaced with "each" in H(4)(b) at p. 41 line 174; and the word "each" needs to be deleted and replaced with "the" in H(4)(c) at p. 41 line 186. These changes are required to make this version internally consistent in the limitation of required copies made and packaged to two, and to avoid unintended distinctions from VERSION TWO.

10. The words "each of"should be deleted from H(11) of VERSION TWO at p. 25 line 313, and from H(9) of VERSION FOUR at p. 43 line 281. In the same two versions and lines, the word "parties" should be replaced with "party." These changes are required to make these versions internally consistent with the limitation of copying and sending records to one party in addition to the patient's side.

11. Finally, in H(9) of VERSION FOUR at p. 43 line 287, change "copies" to "copy," at line 288 change "each" to "the," at line 289 delete "each," and in H(9)(c), p. 43 line 313 change "copies" to "copy." These are all for purposes of internal consistency and consistency with VERSION TWO.

I will provide Gilma with my hand markups of these changes and request that they be circulated to the members as best she can before the meeting. I do not believe any of these changes are substantive or controversial among the subcommittee, unless some members want to fight for the subcommittee's cost containment provision, which I propose to delete (see item 2 above). The questions for the Council are essentially the same ones they have been:

1. Whether to do anything?

2. If so, whether to provide opportunities for objection to the scope of the requested subpoena both before and after it is served and responded too (which medical providers favor but Defense lawyers oppose)?

3. Whether to encourage joint subpoenas by multiple defendants requiring multiple copies of records to be made and sent (which defense lawyers favor) or to restrict the number of copies required in response to any subpoena to two, one for the defendant and one for the patient (which medical providers at least originally favored)?

Sorry for the late confusion about these changes.

Very truly yours,

GAYLORD & EYERMAN, P.C.

William A. Gaylord

WAG:jki

Enclosure

cc: Gilma Henthorne w/Enc.
Members of Council

September 23, 2000

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland M.J.H.

Re: ORCP 44/55 Amendments; Enclosed 9-19-00 Letter from Thomas E. Cooney

I just received the enclosed letter from Tom Cooney enclosing pp. 60056-57 of the 11-3-99 Federal Register containing HIPAA proposed regulation §164.510, which I believe the 44/55 subcommittee has been fully aware of for some time. I suggest you place these materials in your 12-9-00 meeting file.*

Although Mr. Cooney's letter does not expressly so state, his assumption might be that the tentatively adopted amendments to Rules 44 and 55 could still be revised in light of the point he raises. As useful as that point is, I doubt whether it will cause the Council not to promulgate those amendments, especially in view of the fact, or at least what I assume to be the fact, that subpoenas of non-parties' records must be extremely unusual.

It seems to me that the point Mr. Cooney raises almost certainly can be adequately taken care of in the staff comment to the 44/55 amendments, assuming the Council's decision is to promulgate them. I'll therefore incorporate that point, including the suggestion that all parties be named when a subpoena is directed to non-parties' records, and also including a reference to §164.510, in my draft of the staff comment to those amendments.

Speaking of staff comments, for the information of members now in their first biennium of service on the Council, part of my job is to prepare in draft "staff comments" to all newly promulgated amendments. Although their title might imply that they are mine alone, my understanding has always been that staff comments should, insofar as possible, reflect the intent of the full Council, since that is the intent which might matter to a court. Staff comments usually focus on the problem(s) with which newly promulgated amendments are intended to deal. I try to avoid simply paraphrasing amendments themselves. Well drafted amendments do not need, and do not benefit from, paraphrasing.

Enclosed with the notice and agenda of the 12-9-00 meeting will be my drafts of staff comments to all tentatively adopted amendments. At December "promulgation meetings" my drafts are invariably much improved by suggested revisions and criticisms by members.

*There will be an actual meeting on this date, since my suggestion about possibly devising a means of avoiding it went nowhere. Several members expressed strong disagreement with it. Additionally, Mic Alexander told me he personally does not favor the idea of not meeting.

Acknowledged 9-22-00

Cooney & Crew, LLP

LIMITED LIABILITY PARTNERSHIP/ATTORNEYS AT LAW

Thomas E. Cooney

PLEASE RESPOND TO:
888 SW Fifth Avenue
Suite 720
Portland, OR 97204

Phone: (503) 224-7600
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September 19, 2000

Maury Holland
Council on Court Procedures
1221 University of Oregon School of Law
Eugene, Oregon 97403-1221

Re: New HIPAA Regulations

Dear Maury:

The new HIPAA Regulations dealing with confidentiality of Medical Records has a provision that says a medical record of a nonparty cannot be the subject of a subpoena, but can be obtained only by a court order (copy attached). You may wish to consider a change in the ORCPs dealing with this issue, so that lawyers don't mistakenly subpoena nonparty records. It will be difficult for the medical provider to determine whether a patient is a party to the litigation if lawyers use the *et al* designation to list multiple plaintiffs or defendants. I therefore think it's important that we provide in the rule that subpoenas cannot be used to obtain nonparty records, but only court orders.

Sincerely,

Thomas E. Cooney

TEC/alw
Enclosure
cc w/enc: Bob Dernedde
Paul Frisch
Scott Gallant
Mike Crew

(iii) The authorization is known by the covered entity to have been revoked;

(iv) The form lacks an element required by paragraph (c) or (d) of this section, as applicable;

(v) The information on the form is known by the covered entity to be false.

(3) *Compound authorizations.* Except where authorization is requested in connection with a clinical trial, an authorization for use or disclosure of protected health information for purposes other than treatment or payment may not be in the same document as an authorization for or consent to treatment or payment.

(c) *Implementation specifications for authorizations requested by an individual.*—(1) *Required elements.* Before a covered entity may use or disclose protected health information of an individual pursuant to a request from the individual, it must obtain a completed authorization for use or disclosure executed by the individual that contains at least the following elements:

(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;

(ii) The name of the covered entity, or class of entities or persons, authorized to make the requested use or disclosure;

(iii) The name or other specific identification of the person(s) or entity(ies), which may include the covered entity itself, to whom the covered entity may make the requested use or disclosure;

(iv) An expiration date;

(v) Signature and date;

(vi) If the authorization is executed by a legal representative or other person authorized to act for the individual, a description of his or her authority to act or relationship to the individual;

(vii) A statement in which the individual acknowledges that he or she has the right to revoke the authorization, except to the extent that information has already been released under the authorization; and

(viii) A statement in which the individual acknowledges that information used or disclosed to any entity other than a health plan or health care provider may no longer be protected by the federal privacy law.

(2) *Plain language requirement.* The model form at appendix A to this subpart may be used. If the model form at appendix A to this subpart is not used, the authorization form must be written in plain language.

(d) *Implementation specifications for authorizations for uses and disclosures requested by covered entities.*—(1) *Required elements.* Before a covered entity may use or disclose protected health information of an individual pursuant to a request that it has made, it must obtain a completed authorization for use or disclosure executed by the individual that meets the requirements of paragraph (c) of this section and contains the following additional elements:

(i) Except where the authorization is requested for a clinical trial, a statement that it will not condition treatment or payment on the individual's providing authorization for the requested use or disclosure;

(ii) A description of the purpose(s) of the requested use or disclosure;

(iii) A statement that the individual may:

(A) Inspect or copy the protected health information to be used or disclosed as provided in § 164.514; and

(B) Refuse to sign the authorization; and

(iv) Where use or disclosure of the requested information will result in financial gain to the entity, a statement that such gain will result.

(2) *Required procedures.* In requesting authorization from an individual under this paragraph, a covered entity must:

(i) Have procedures designed to enable it to request only the minimum amount of protected health information necessary to accomplish the purpose for which the request is made; and

(ii) Provide the individual with a copy of the executed authorization.

(e) *Revocation of authorizations.* An individual may revoke an authorization to use or disclose his or her protected health information at any time, except to the extent that the covered entity has taken action in reliance thereon.

§ 164.510 Uses and disclosures for which individual authorization is not required.

A covered entity may use or disclose protected health information, for purposes other than treatment, payment, or health care operations, without the authorization of the individual, in the situations covered by this section and subject to the applicable requirements provided for by this section.

(a) *General requirements.* In using or disclosing protected health information under this section:

(1) *Verification.* A covered entity must comply with any applicable verification requirements under § 164.518(c).

(2) *Health care clearinghouses.* A health care clearinghouse that uses or discloses protected health information it maintains as a business partner of a covered entity may not make uses or disclosures otherwise permitted under this section that are not permitted by the terms of its contract with the covered entity under § 164.506(e).

(b) *Disclosures and uses for public health activities.*—(1) *Permitted disclosures.* A covered entity may disclose protected health information for the public health activities and purposes described in this paragraph to:

(i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions;

(ii) A public health authority or other appropriate authority authorized by law to receive reports of child abuse or neglect;

(iii) A person or entity other than a governmental authority that can demonstrate or demonstrates that it is acting to comply with requirements or direction of a public health authority; or

(iv) A person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition and is authorized by law to be notified as necessary in the conduct of a public health intervention or investigation.

(2) *Permitted use.* Where the covered entity also is a public health authority, the covered entity is permitted to use protected health information in all cases in which it is permitted to disclose such information for public health activities under paragraph (b)(1) of this section.

(c) *Disclosures and uses for health oversight activities.*—(1) *Permitted disclosures.* A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audit, investigation, inspection, civil, criminal, or administrative proceeding or action, or other activity necessary for appropriate oversight of:

(i) The health care system;

(ii) Government benefit programs for which health information is relevant to beneficiary eligibility; or

(iii) Government regulatory programs for which health information is necessary for determining compliance with program standards.

(2) *Permitted use.* Where a covered entity is itself a health oversight agency, the covered entity may use protected health information for health oversight activities described by paragraph (c)(1) of this section.

(d) *Disclosures and uses for judicial and administrative proceedings.*—(1) *Permitted disclosures.* A covered entity may disclose protected health

information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal; or

(ii) Where the individual is a party to the proceeding and his or her medical condition or history is at issue and the disclosure is pursuant to lawful process or otherwise authorized by law.

(2) *Permitted use.* Where the covered entity is itself a government agency, the covered entity may use protected health information in all cases in which it is permitted to disclose such information in the course of any judicial or administrative proceeding under paragraph (d)(1) of this section.

(3) *Additional restriction.* (i) Where the request for disclosure of protected health information is accompanied by a court order, the covered entity may disclose only that protected health information which the court order authorizes to be disclosed.

(ii) Where the request for disclosure of protected health information is not accompanied by a court order, the covered entity may not disclose the information requested unless a request authorized by law has been made by the agency requesting the information or by legal counsel representing a party to litigation, with a written statement certifying that the protected health information requested concerns a litigant to the proceeding and that the health condition of such litigant is at issue at such proceeding.

(e) *Disclosures to coroners and medical examiners.* A covered entity may disclose protected health information to a coroner or medical examiner, consistent with applicable law, for the purposes of identifying a deceased person or determining a cause of death.

(f) *Disclosures for law enforcement purposes.* A covered entity may disclose protected health information to a law enforcement official if:

(1) *Pursuant to process.* (i) The law enforcement official is conducting or supervising a law enforcement inquiry or proceeding authorized by law and the disclosure is:

(A) Pursuant to a warrant, subpoena, or order issued by a judicial officer that documents a finding by the judicial officer;

(B) Pursuant to a grand jury subpoena; or

(C) Pursuant to an administrative request, including an administrative subpoena or summons, a civil investigative demand, or similar process authorized under law, provided that:

(*1*) The information sought is relevant and material to a legitimate law enforcement inquiry;

(*2*) The request is as specific and narrowly drawn as is reasonably practicable; and

(*3*) De-identified information could not reasonably be used.

(ii) For the purposes of this paragraph, "law enforcement inquiry or proceeding" means:

(A) An investigation or official proceeding inquiring into a violation of, or failure to comply with, law; or

(B) A criminal, civil, or administrative proceeding arising from a violation of, or failure to comply with, law.

(2) *Limited information for identifying purposes.* The disclosure is for the purpose of identifying a suspect, fugitive, material witness, or missing person, *provided* that, the covered entity may disclose only the following information:

(i) Name;

(ii) Address;

(iii) Social security number;

(iv) Date of birth;

(v) Place of birth;

(vi) Type of injury or other distinguishing characteristic; and

(vii) Date and time of treatment.

(3) *Information about a victim of crime or abuse.* The disclosure is of the protected health information of an individual who is or is suspected to be a victim of a crime, abuse, or other harm, if the law enforcement official represents that:

(i) Such information is needed to determine whether a violation of law by a person other than the victim has occurred; and

(ii) Immediate law enforcement activity that depends upon obtaining such information may be necessary.

(4) *Intelligence and national security activities.* The disclosure is:

(i) For the conduct of lawful intelligence activities conducted pursuant to the National Security Act (50 U.S.C. 401, *et seq.*);

(ii) Made in connection with providing protective services to the President or other persons pursuant to 18 U.S.C. 3056; or

(iii) Made pursuant to 22 U.S.C. 2709(a)(3).

(5) *Health care fraud.* The covered entity believes in good faith that the information disclosed constitutes evidence of criminal conduct:

(i) That arises out of and is directly related to:

(A) The receipt of health care or payment for health care, including a fraudulent claim for health care;

(B) Qualification for or receipt of benefits, payments, or services based on a fraudulent statement or material misrepresentation of the health of the individual;

(ii) That occurred on the premises of the covered entity; or

(iii) Was witnessed by a member of the covered entity's workforce.

(5) *Urgent circumstances.* The disclosure is of the protected health information of an individual who is or is suspected to be a victim of a crime, abuse, or other harm, if the law enforcement official represents that:

(i) Such information is needed to determine whether a violation of law by a person other than the victim has occurred; and

(ii) Immediate law enforcement activity that depends upon obtaining such information may be necessary.

(g) *Disclosures and uses for governmental health data systems.*—(1) *Permitted disclosures.* A covered entity may disclose protected health information to a government agency, or private entity acting on behalf of a government agency, for inclusion in a governmental health data system that collects health data for analysis in support of policy, planning, regulatory, or management functions authorized by law.

(2) *Permitted uses.* Where a covered entity is itself a government agency that collects health data for analysis in support of policy, planning, regulatory, or management functions, the covered entity may use protected health information in all cases in which it is permitted to disclose such information for government health data systems under paragraph (g)(1) of this section.

(h) *Disclosures of directory information.* (1) *Individuals with capacity.* For individuals with the capacity to make their own health care decisions, a covered entity that is a health care provider may disclose protected health information for directory purposes, provided that, the individual has agreed to such disclosure.

(2) *Incapacitated individuals.* For individuals who are incapacitated, a covered entity that is a health care provider may, at its discretion and consistent with good medical practice and any prior expressions of preference of which the covered entity is aware, disclose protected health information for directory purposes.

(3) *Information to be disclosed.* The information that may be disclosed for directory purposes pursuant to paragraphs (h)(1) and (2) of this section, is limited to:

(i) Name of the individual;

(ii) Location of the individual in the health care provider's facility; and

(iii) Description of the individual's condition in general terms that do not

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September 26, 2000

Maury Holland, Professor
Gilma Henthorne, Executive Assistant
University of Oregon, School of Law
1515 Agate Room, 307C
Eugene OR 97403

Re: Council on Court Procedures

Dear Maury and Gilma:

I just want to summarize our recent discussions concerning the proposals to be published. First, with regard to the "compelled medical examination" changes to rule 44, Maury and I went through the versions that had been typed out, and they are accurate, and properly reflect the action of the Council. There was some questions concerning whether a fourth alternative had in fact been voted out. This is the so-called "Spooner proposal". The records of the meeting indicate that such proposal was not approved for publication. I also called Ralph, and he confirmed that is well. Therefore, we will be publishing the three alternate proposed changes to the "compelled medical examination" provisions of rule 44.

We also discussed Judge Harris' proposed changes to rule 58. I did finally have a chance to talk with him on the phone. It is agreed that we will publish the changes as approved by the Council, and without the changes to the title which judge Harris had proposed. In addition, judge Harris did not intend that the proposals that were not approved by the Council be published. Obviously, they will not be published.

We then discussed the proposed changes to rule 44/55, the "Gaylord proposal". Bill noted an error in his proposal to the extent that the change sought to delete section D. In fact, the proper notations should be "text unchanged". Maury and I felt that this change could be made without violating the understanding that the exact language ruled on by the Council should be published. I also talked to Bill about the fact that the language in subsection D. will be somewhat inaccurate to the extent that it indicates that "if an obligation to furnish a report arises under sections B or C of this rule", a report can be compelled. In fact, subsection D should probably changed to say that "if an obligation to furnish a report arises under section B of this rule". Despite this slight anomaly, Bill and I agreed that we would rather merely change the provision which indicates that subsection D is deleted, and not try to implement a change to the text of the rule. Such correction can be made sometime in the future.

Finally, Gilma and I have talked to some extent about the fact that we have two proposals that affect rule 44, and how the publication of these proposals should proceed. Gilma had some question about whether or not the to proposals should be published as a single rule change to rule 44. I indicated that this should not occur, and that the proposals should be entirely separate. If we sent out a single rule incorporating all of the proposed changes, then the Council could only vote on that rule which had both the changes to the independent medical examination provisions, and the changes to the production of medical records. In my opinion, this would prevent us from approving one of the changes, but not the other. I would rather publish the separate changes, and presume that passage of both would allow the Council to incorporate the changes in one rule without violating the "exact language requirements" of the statute. If I'm incorrect in my assumption, then so be it.

I hope this is helpful.

Sincerely,

SWANSON, LATHEN, ALEXANDER & McCANN, P.C.

DICTATED BUT NOT READ

J. Michael Alexander

JMA/jb

C: (same as A but 1st opportunity to object, ie. before service on provider and receipt of copies, is deleted).

DRAFT FOR CONSIDERATION AT 8-12-00 COUNCIL MEETING

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

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

A. Order for examination.

(text unchanged)

B. Report of examining physician or psychologist.

(text unchanged)

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

(delete title and text)

C. Health Care Records.

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

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

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

C(2)(b) obtaining the voluntary written consent to release of the records to such party from the injured

relating to the injury for which recovery is sought

party or its legal custodian or guardian before seeking them from the health care provider.

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

D. Report; effect of failure to comply.

(delete section entirely)

E. Access to hospital records.

(delete section entirely)

SUBPOENA
RULE 55

(A. through G. unchanged.)

* * * * *

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

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

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

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

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

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

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

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

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

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

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

Done

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

or

H(3)~~(a)(ii)~~ (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~~

Done

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

Done

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

H(4) *TITLE.* Upon receipt of an objection to all or part of a SUBPOENA and AUTHORIZATION pursuant to paragraph (2)(b) above, the party issuing the SUBPOENA and

Done

or objection to any part of the ~~request~~ health care records sought by ~~from~~ a provider in response thereto)

AUTHORIZATION may seek an order compelling discovery, pursuant to Rule 46.

move this paragraph, as modified to H(4)(6) below

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

H(4) ~~H(6)~~ *Statement of instructions.* Along with a SUBPOENA and AUTHORIZATION for health care records directly from a health care provider or facility hereunder, the party whose records are sought shall prepare and serve on the hospital or health care provider with the AUTHORIZATION the following STATEMENT OF INSTRUCTIONS:

done

H(4) ~~(6)~~(a) Enclosed with this STATEMENT OF INSTRUCTIONS is a statutory SUBPOENA and AUTHORIZATION TO DISCLOSE MEDICAL RECORDS pursuant to ORS 192.525(3) which has been signed by a person able to consent to the release of the requested records or authorized by law to obtain the records. Copies of the designated records are sought by each of the following parties:

done

H(4) ~~(6)~~(a)(i) (name and address of person whose records are sought, or his or her attorney)

done

H(4) ~~(6)~~(a)(ii) (name and address of each other party or his or her attorney who seeks access to the records)

done

H(4) ~~(6)~~(b) In order to comply with this Authorization and these instructions, please make ___ copies of the designated records, place each copy in a separately sealed package bearing the address and postage to each of the names identified above, and place all of them together in one package or shipment, and mail that package within five (5) days of this date to the person whose records are sought or his or her representative, whose name and address are listed first above. Only _____ (name of person or his or her attorney whose records are sought) is authorized to receive the copies of these records directly from you.

done

H(4) ~~(6)~~(c) The STATEMENT OF INSTRUCTIONS shall be signed by the party whose records are sought, or his or her attorney, and a copy served with a certificate of service pursuant to section C of Rule 9 on each party or his or her attorney, seeking discovery of the health care records.

H(5)(7) *Mode of Compliance.* Health care records may be obtained by subpoena pretrial only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law have been complied with and such compliance is evidenced through an appropriate court order or through execution of an appropriate consent. Absent such consent or court order, production of the requested records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate consent or court order does accompany the subpoena, then production of all records requested shall be considered production of the records responsive to the subpoena.

H(5)(7)(a) Except as provided in subsection (9) of this section, when a subpoena is served upon a custodian of health care records in an action in which the health care provider is not a party, and the subpoena requires the production of all or part of the records of the health care provider relating to the care or treatment of a patient of the health care provider, it is sufficient compliance therewith if a custodian delivers by mail or otherwise the number of true and correct copies of all the records responsive to the subpoena indicated in the subpoena or statement of instructions, within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection 8 of this section. The copies may be photographic or microphotographic reproduction.

H(6)(8) *Affidavit of custodian of records.*

H(6)(8)(a) The records described in this section shall be accompanied by the affidavit of the custodian of the health care provider, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copies are true copies of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the health care provider, in the ordinary course of its business, at or near the time of the act, condition, or event described or referred to therein.

H(6)(8)(b) If the health care provider has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and

shall send only those records of which the affiant has custody.

H(~~8~~ 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(~~9~~ 7) *Personal attendance of custodian of records may be required.*

H(~~9~~ 7)(a) The personal attendance of a custodian of health care provider records and the production of original health care provider records are required if the subpoena duces tecum contains the following statement:

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

H(~~9~~ 7)(b) If more than one subpoena duces tecum is served on a custodian of health care provider records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(~~10~~ 8) *Fees for copies.* A health care provider may charge a reasonable fee for responding to a release authorization or subpoena for health care records. A reasonable fee for copying and providing such records shall not exceed twenty-five cents ($0.25) per page, less any prepaid witness fee, in the absence of personal attendance by the custodian of the records.

H(~~11~~ 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 ~~copies~~ set of the records on each

party seeking them, or shall serve each such party with objections to their production pursuant to Rule 43 B.

H(~~11~~ 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.

Done

H(9) ~~H(11)~~ (b) Insert H(4) above as numbered here.

Done

H(9) ~~H(11)~~ (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(~~12~~ 10) *TITLE NEEDED.* 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.

Done

H(~~13~~ 11) *TITLE NEEDED.* 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.

Done

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

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

I(1) 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) 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.

* * * * *

B: (same as A except provides only packages two copies, one for ~~subpoena~~ subpoenaing party, one for patient). Done

DRAFT^ FOR CONSIDERATION AT 8-12-00 COUNCIL MEETING

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

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

A. Order for examination.

(text unchanged)

B. Report of examining physician or psychologist.

(text unchanged)

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

(delete title and text)

C. Health Care Records.

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

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

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

C(2)(b) obtaining the voluntary written consent to release of the records to such party from the injured

relating to the injury for which recovery is sought

party or its legal custodian or guardian before seeking them from the health care provider.

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

D. Report; effect of failure to comply.

(delete section entirely)

E. Access to hospital records.

(delete section entirely)

SUBPOENA
RULE 55

(A. through G. unchanged.)

* * * * *

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

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

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

~~Access to health care records directly from provider.~~

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

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

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

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

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

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

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

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

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

or

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

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

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

H(4) *TITLE.* Upon receipt of an objection to all or part of a SUBPOENA and AUTHORIZATION pursuant to paragraph (2)(b) above, the party issuing the SUBPOENA and

AUTHORIZATION may seek an order compelling discovery, pursuant to Rule 46.

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

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

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

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

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

H(6)(b) In order to comply with this Authorization and these instructions, please make two done 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~~ each 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. done

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

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

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

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

done

H(8)(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(8)(b) If the health care provider has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and

shall send only those records of which the affiant has custody.

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

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

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

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

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

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

H(11) *Obligation of party or attorney of party whose health care records are received from health care provider pursuant to subpoena.* Upon receipt of the sealed copies of the health care records addressed to each of the parties seeking access to them, the party whose records are sought, or his or her attorney, shall open only the copy addressed to that party or attorney, and shall have 14 days in which to review them. Not later than 14 days after receipt of the records from the health care provider or facility, the party whose records are sought shall either serve the unopened ~~copies~~ copy of the records on ~~each~~ the [illegible]

party seeking them, or shall serve ~~each~~ such party with objections to their production pursuant to Rule 43 B.

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

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

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

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

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

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

I(1) 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) 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.

* * * * *

A: (the committee draft with scope of discovery in 44 C 2 and 55 H 2 corrected).

DRAFT FOR CONSIDERATION AT 8-12-00 COUNCIL MEETING

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

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

A. Order for examination.

(text unchanged)

B. Report of examining physician or psychologist.

(text unchanged)

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

(delete title and text)

C. Health Care Records.

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

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

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

C(2)(b) obtaining the voluntary written consen to release of the records to such party from the injur

relating to the injury for which

Date

party or its legal custodian or guardian before seeking them from the health care provider.

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

D. Report; effect of failure to comply.

(delete section entirely)

E. Access to hospital records.

(delete section entirely)

SUBPOENA
RULE 55

(A. through G. unchanged.)

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

or

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

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

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

H(4) *TITLE.* Upon receipt of an objection to all or part of a SUBPOENA and AUTHORIZATION pursuant to paragraph (2)(b) above, the party issuing the SUBPOENA and

AUTHORIZATION may seek an order compelling discovery, pursuant to Rule 46.

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

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

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

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

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

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

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

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

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

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

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

H(8)(b) If the health care provider has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and

shall send only those records of which the affiant has custody.

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

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

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

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

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

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

H(11) *Obligation of party or attorney of party whose health care records are received from health care provider pursuant to subpoena.* Upon receipt of the sealed copies of the health care records addressed to each of the parties seeking access to them, the party whose records are sought, or his or her attorney, shall open only the copy addressed to that party or attorney, and shall have 14 days in which to review them. Not later than 14 days after receipt of the records from the health care provider or facility, the party whose records are sought shall either serve the unopened copies of the records on each

party seeking them, or shall serve each such party with objections to their production pursuant to Rule 43 B.

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

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

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

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

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

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

I(1) 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) 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.

* * * * *

December 1, 2000

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland M.J.H.

Re: Rules 44/55 Amendments; Comments of OADC

Attached are copies of a 11-30-00 letter from Jonathan Hoffman on behalf of OADC commenting on the tentatively adopted amendments to Rules 44 and 55, and of his 5-18-00 letter, also on behalf of OADC, regarding the same subject.

OADC Oregon Association of Defense Counsel

Acknowledged 11/30/00

November 30, 2000

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Prof. Maurice J. Holland, Executive Director
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Re: Proposed Amendments to Oregon Rules of Civil Procedure 44 and 55

Dear Professor Holland:

The Oregon Association of Defense Counsel Board of Directors has now had an opportunity to review the final version of proposed amendments to ORCP 44 and 55, which will come before the Council on December 9, 2000. As you know, the OADC Board objected to the proposed amendments for a number of reasons by letter to you dated May 18, 2000.

The OADC Board appreciates the willingness of the Council to consider the views of the OADC, whose members comprise a large part of the civil trial practitioners in the State of Oregon. The final version of the proposed amendments to ORCP 44 and 55 does address some of the OADC's concerns with these proposed amendments. For example, the new version reduces earlier version's multiple opportunities for objections to production of medical records. However, notwithstanding the improvements, OADC's membership continues to have strong objections to the proposed amendments and believes that these proposed amendments will complicate rather than streamline medical records discovery in civil litigation. We refer you to our letter of May 18, 2000, that sets out these objections in detail. A copy of that letter is attached for your reference. We believe that adoption of these proposed amendments would delay the production of medical records and create an adversarial framework that would require an incredible amount of court time to resolve disputes between plaintiffs bar and defendants over discoverability of certain records. The procedure created by these amendments is cumbersome and time-consuming. In the end, we believe a number of plaintiff's counsel, even if they comply with the various time deadlines in

the rules, will routinely withhold medical records on the basis they do not relate "to the injury for which recovery is sought." This, in time, will inexorably lead to continual court intervention concerning these issues.

We understand that a lot of work went into these proposed amendments. We do not make our objections lightly. The OADC Board believes a better approach can be designed to streamline the full and complete disclosure of medical records in a way that would significantly reduce the need for court intervention. In this regard, we have conducted some research and confirmed that most states have some form of waiver of the physician/patient privilege when a person files a lawsuit putting their bodily condition at issue. For example, New Mexico, Nevada, California, Washington, Alaska and Hawaii, all have some form of favor of the physician/patient privilege when the person puts their bodily condition at issue. The New Mexico rule is fairly typical. It provides as follows:

> *Section 11-504(D)(3): Condition an Element of Claim or Defense: There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.*

Nevada, Alaska and Hawaii follow similar approaches. The other states mentioned above have variations of this rule. We believe that a short amendment to Oregon Evidence Code Rule 505, similar to the New Mexico provision above, could significantly simplify the production of medical records in civil litigation. The OADC , at this time, is not proposing that there be any *ex parte* contact with treating physicians or depositions of treating physicians in civil litigation. The focus of the amendment would simply be to streamline the production of medical records. The OADC is presently considering proposing such an amendment to the upcoming legislature. We have not yet fully researched all the mechanics of how medical records are produced in these various states that recognize a physician/patient waiver upon the filing of a lawsuit. There is no question that discovery disputes can occasionally arise over relevancy and some other objections other than privilege to the production of medical records, as with other discovery issues motions for protective order and motions in limine are already available procedural

remedies to resolve these issues. We think that these procedures can readily be adopted, and perhaps improved, to adequately ensure that plaintiff's bar can raise appropriate relevancy objections or other appropriate evidentiary objections to the production of specific records or in advance of trial without creating a process as complicated as what is presently being proposed.

We propose the establishment of a committee formed of members from the OADC, Oregon Trial Lawyers Association, and representatives from the Oregon Medical Association, perhaps under the auspices of the Civil Law Advisory Committee, to try to reach some consensus for a mechanism for the full and fair production of medical records. If we could reach an agreement on all points, we could then come back to the Council on Court Procedures with an outline of what we can agree upon and try to put together a proposal agreeable to all parties.

OTLA and the OMA have raised additional concerns about the proposed amendments to ORCP 44 and 55, arising from some federal regulations presently being promulgated regarding access to patient medical records and production of medical records that may significantly affect the procedural production of medical records. These are referred to as the HIPAA Patient Privacy Rules. We understand these rules are authorized by what is referred to fully as the Health Insurance Portability and Accountability Act of 1996. As we understand it, these rules will govern in some fashion what medical providers must do with records in response to a patient release. Whatever is ultimately adopted, time will be needed to educate both medical practitioners and lawyers as to how to comply with the new procedure. It makes sense to do this once rather than twice. Therefore, we think it would be a good idea to defer adoption of proposed amendments to ORCP 44 and 55 until we can ensure that the procedure fits within any procedural requirements of the new regulations.

In summary, the OADC Board believes that the current proposed amendments to ORCP 44 and 55 risk imposing an unnecessary, cumbersome, time-consuming and litigious approach to the production of medical records in civil litigation. We believe they are a step in the wrong direction. A much more streamlined approach to the production of medical records can be established that would involve a waiver of the physician/patient privilege upon the filing of a lawsuit, coupled with automatic protection of such records from public disclosure as well as appropriate mechanisms so the plaintiff's bar can raise relevancy and

appropriate objections pretrial without delaying the production of records and taking up substantial court time. We are prepared to work with the Oregon Trial Lawyers Association and the Oregon Medical Association in trying to fashion a more workable approach.

Thank you for this opportunity to further comment on these proposed amendments. We urge the members of the Council on Court Procedures to table these proposed amendments for further study by the involved groups or to disapprove the proposed amendments as presently written.

Very truly yours,

Jonathan M. Hoffman
President

Enc.
cc: Mr. J. Michael Alexander (via facsimile 503-588-7179)
Mr. William A. Gaylord (via facsimile 503-228-3628)
Mr. Ralph C. Spooner (via facsimile 503-588-5899)

OADC Oregon Association of Defense Counsel

Jonathan M. Hoffman

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May 18, 2000

VIA FACSIMILE 541-346-1564

Prof. Maurice J. Holland, Executive Director
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Re: Proposed Amendments to Oregon Rules of Civil Procedure 44 and 55

Dear Professor Holland:

The Oregon Association of Defense Counsel appreciates the opportunity to comment on the proposed amendments to ORCP 44 and 55, which we understand will be further considered at the Council meeting on Saturday, May 20, 2000.

The OADC board discussed these proposed amendments, at length, at our last meeting on May 10, 2000. After careful consideration, the OADC has decided to oppose the amendments to ORCP 44 and 55. The OADC respectfully believes that these proposed amendments would significantly complicate, delay and increase the cost for the parties, attorneys and court of obtaining necessary medical records for use in civil litigation. The OADC board raised the following concerns, among others, about the proposed amendments to ORCP 44 and 55.

First, obtaining medical records under these proposed amendments could take 90 days or more, particularly when following the new authorization/subpoena procedure. There are so many places where plaintiff's counsel can object to the subpoena or particular records that the parties and court could be tied up with motions to compel and other procedural complications for months, trying to obtain medical records. There is nothing in these proposed amendments that would require a plaintiff or plaintiff's counsel to provide a list of medical providers at the time a personal injury lawsuit is filed. As a practical matter, therefore, defense counsel often does not find out about all the medical providers until the time of the plaintiff's deposition. Because of Rule 21 motions and document discovery, that deposition can often be as much as six months after the filing of a lawsuit. If defense counsel then needed to proceed with the subpoena/authorization route, it could be very

difficult to obtain those records in preparation for trial. As you know, a number of Oregon counties, such as Multnomah, follow a very strict adherence to the 12-month trial rule. Coos County sets cases 6 to 8 months from filing and setovers are rarely granted. The roadblocks facilitated by these amendments seem very unfair when a plaintiff's attorney often has months or years to obtain records and prepare a case before filing a lawsuit.

Second, the OADC believes that these proposed amendments would be a step backward from existing rules. For example, under current practice, defense counsel can subpoena hospital records under ORCP 55(h) and medical records under ORCP 55(I). There was, no doubt, substantial discussion about these provisions when they were adopted. As we read the new proposed amendments, the authorization and subpoena and the records would go to plaintiff's counsel even as to hospital records, which has not been existing practice. Plaintiff's counsel now has 14 days to object to a hospital subpoena under ORCP 55(h). We do not see why additional roadblocks need to be created for the production of medical records.

Third, the OADC believes that these proposed amendments will result in significant time and cost for plaintiff's counsel, defense counsel and the courts. We envision a significant increase in pretrial discovery motions, arguing over the scope of subpoenas and what records will be produced and what records will not be produced. As will be discussed below, we do not believe any of this is necessary, and the production of medical records can be accomplished much more easily to all parties concerned as is done in many states. It is beneficial to all parties and to the system to facilitate early case evaluation and early settlement discussion. This proposal does just the opposite.

Fourth, these amendments shift all the decision making about what is relevant discovery from the courts to the plaintiff's attorney. It is not uncommon for parties to have legitimate disagreement about which medical records are relevant to a particular injury claim; it is difficult for the court to fairly resolve such a disagreement without both sides having have a full opportunity to know what the medical records say in the first place.

The OADC requests the Council on Court Procedures to table these proposed amendments so that all interested groups could try to come up with a much more efficient way to produce medical records. We urge the Council to consider a proposal to accomplish the following:

First, a plaintiff waives the physician/patient privilege when a lawsuit is filed which places plaintiff's physical or mental condition in issue.

Second, a plaintiff or their attorney shall respond to an agreed upon interrogatory form that requires the plaintiff to reveal names of medical providers they have seen over the last 10 years.

Third, plaintiff or the plaintiff's attorney, shall provide a release to obtain all of those records.

Fourth, an independent process service company could then obtain copies of all those records for both the plaintiff's counsel and the defense counsel.

Fifth, plaintiff is entitled to a protective order ensuring that information about plaintiff's medical condition would only be used in the context of the litigation, and if requested, the records would be returned to plaintiff, or plaintiff's counsel, at the conclusion of the case.

Sixth, plaintiff counsel would have sufficient time to make any objections as to the admissibility of any of the records prior to trial.

The OADC recognizes the Council on Court Procedures has limited authority to adopt amendments that would affect the patient/physician privilege and that, therefore, some of these proposed changes might have to be made by the legislature. However, the OADC believes that the type of procedure outlined above would make life much easier on plaintiff's counsel, defense counsel and the courts, while at the same time, ensuring the confidentiality of plaintiff's medical information. In practice, defense counsel are not going to try to refer to medical records at trial that have nothing to do with the injuries being claimed. For example, if a plaintiff is claiming neck injuries, defense counsel is not going to refer to unrelated prior problems that plaintiff has had with his knee. Any objections that a plaintiff's counsel may have to any records coming in at trial can be made in advance of trial, but do not need to delay the production of those records. The records at a minimum may lead to admissible evidence and, therefore, are discoverable. We suspect that there would be a number of plaintiff's attorneys that would not object to this type of proposal, which is used in a number of states. This would be much better for the court system. The details of such a proposal could be worked out with all interested groups.

The OADC recognizes that the Council is made up of counsel representing the number of different interests and trial judges. We further recognize that the Council attempts to work in a bipartisan way and that it can be difficult to get consensus on any type of amendments. We know that a substantial amount of work has gone into these proposed amendments. We do not make these objections lightly or as a knee-jerk partisan reaction, but sincerely believe that these proposed amendments will seriously interfere with the ability of defense counsel to represent their clients, some of whom are being sued for substantial sums of money, above available insurance policy limits. The proposed amendments are simply not acceptable to the OADC.

Thank you for this opportunity. We will have a representative at the meeting on May 20, 2000.

Very truly yours,

/s/ Jonathan M. Hoffman

Jonathan M. Hoffman
President

cc: Mr. William A. Gaylord (via facsimile 503-228-3628)
Mr. Ralph C. Spooner (via facsimile 503-588-5899)
Ms. Kathryn S. Chase (via facsimile 541-343-0701)
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December 4, 2000

VIA PRIORITY MAIL

Council on Court Procedures
c/o Professor Maury Holland
University of Oregon School of Law
Eugene, Oregon 97403-1221

RE: Proposed Changes to ORCP 44

Dear Council Members:

I am writing regarding the proposed changes to ORCP 44 (compelled medical exams). Because the date for voting on these changes is approaching, this information is being mailed to you directly, rather than through Professor Maury Holland. Also, I hope that receiving this information in advance of the meeting will give you an opportunity to review it, because it is somewhat voluminous.

The purpose of this letter is to strongly support adoption of Alternative #1 (examinee has right to record exam and to have attorney present). This alternative is the only one which guarantees that examinees will be protected from abuse, whether inadvertent or intentional. In my opinion, many Oregon lawyers (myself included) have been remiss over the years in not seeking for our clients the protections which Alternative #1 would provide. Fortunately the practice is changing, and I now see lawyers routinely consulting with opposing counsel about these issues and/or filing motions in the trial courts. Unfortunately, there is presently no uniformity in what is being allowed, and I expect that we will soon see appellate court challenges to trial court rulings which deny examinees the right to record or have counsel present at their compelled medical exams.

As an example of what might be expected regarding court challenges in this area, I am enclosing copies of two cases on this subject decided by the Alaska Supreme Court. In the earlier case, *Langfeldt-Haaland v. Saupe*, 768 P2d 1144 (1989), the trial judge had denied a personal injury plaintiff's request to record his compelled medical exam and to have his attorney present. The Alaska Supreme Court granted plaintiff's petition for review and reversed, citing the due process clause of the Alaska Constitution (art. I § 7) as authority for its holding that "[p]arties are, in general, entitled to the protection and advice of counsel when they enter the litigation arena," thus "counsel in a civil case should have the right to attend a physician or psychiatric exam of his client." In the second case, *State of Alaska v. Johnson*, 2 P3d 56 (2000), a personal injury action involving a prison inmate who fell on a stairway, the trial court excluded the testimony of the physician who conducted a compelled medical exam without the plaintiff's counsel being present, and the Alaska Supreme Court affirmed.

Also enclosed is a copy of 84 ALR4th 558 (1991) (including 2000 Pocket Part), which compiles the cases in which appellate courts have considered whether or under what circumstances a party to a civil action, subjected to a physical or mental exam at the instance of an opposing party and conducted by a medical expert of the opponent's choice, is entitled or permitted to have his or her own attorney or medical expert present during the exam. Although the jurisdictions are split, it appears that the majority of state courts which have addressed this issue have ruled in favor of the view that an examinee ordinarily may have an attorney present. Specific case citations from appellate courts in Alaska, California, Florida, Illinois, Michigan, New York, Pennsylvania and Washington may be found at pages 569 - 571 and in the Pocket Part at pages 25 - 26.

Finally, I am enclosing an important recent case, *U.S. Security Ins. Co. v. Cimino*, 754 So2d 697 (2000) (not included in the ALR annotation), in which the Supreme Court of Florida extended the right to counsel to compelled medical exams for personal injury protection (PIP) benefits. The court reasoned that "when resort to an independent medical exam is deemed necessary by either party, the parties' relationship is clearly adversarial," and the party being examined is entitled to the same protections that are afforded parties at other stages of the adversary process.

Thank you for your consideration of this matter.

Very truly yours,

GAYLORD & EYERMAN, P.C.

Linda K. Eyerman

Linda K. Eyerman
LKE:cb
Enclosures
cc: Via Priority Mail (w/enc)

J. Michael Alexander, Chair
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SUBJECT OF ANNOTATION

Beginning on page 558

Right of party to have attorney or physician present during physical or mental examination at instance of opposing party

Svend LANGFELDT-HAALAND, Petitioner
v
SAUPE ENTERPRISES, INC., Respondent

Supreme Court of Alaska
February 17, 1989
768 P2d 1144, 84 ALR4th 547

SUMMARY OF DECISION

A defendant in a personal injury action moved for an order requiring that the plaintiff in the action submit to a physical examination by a physician selected by the defendant, as authorized by an Alaska rule of civil procedure. The plaintiff did not object, but asserted rights to record the examination and to have his attorney present. An Alaska trial court ordered the plaintiff to submit to the examination without benefit of counsel or tape recording.

The Supreme Court of Alaska, Mathews, Ch. J., reversed. Stressing that a medical examination authorized in a personal injury action under the rule of civil procedure was part of the litigation process, and often a critical part, the court held that a plaintiff's counsel is entitled to attend and record, as a matter of course, court-ordered medical examinations in civil cases, while the trial courts retain authority to enter appropriate protective orders. The court held that there was a constitutional right to counsel in civil cases arising under the due process clause of the Alaska Constitution, and that while the right to counsel in civil cases was not coextensive with the right to counsel in criminal prosecutions, in the area of compelled examinations there was no reason to draw a distinction.

Moore, J., dissented and filed a separate opinion in which Compton, J., joined.

HEADNOTES

Classified to ALR Digests

Attorneys § 48; Discovery and Inspection § 19 — compelled medical examination in personal injury action — right to have attorney present

1. When the plaintiff in a personal injury action is compelled to have a medical examination by a doctor chosen by the opposing party, as authorized under a state rule of civil procedure, the plaintiff is entitled to have his counsel attend and record, as a matter of course, such a court-ordered medical examination, with the trial courts retaining power to enter appropriate protective orders.

[Annotated]

Constitutional Law § 626 — due process — right to counsel in civil cases — compelled medical examinations

2. There is a constitutional right to counsel in civil cases arising from the due process clause of the state constitution, and while the right to counsel in civil cases is not coextensive with the right to counsel in criminal prosecutions, there is no reason to draw a distinction between the two classes of cases in the area of compelled examinations by a physician chosen by the opposing party, as authorized under a state rule of civil procedure in personal injury actions.

[Annotated]

APPEARANCES OF COUNSEL

Joseph L. Paskvan, Hoppner & Paskvan, Fairbanks, for petitioner.

Susan M. West, Robertson, Monagle & Eastaugh, Anchorage, and **Howard Staley, Staley, DeLisio, Cook & Sherry,** Fairbanks, for respondent.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION OF THE COURT

MATTHEWS, Chief Justice.

This petition raises the question whether an attorney for a plaintiff in a personal injury case is entitled to attend or tape record a Civil Rule 35[1] medical examination.

1. Alaska R.Civ.P. 35.

Svend Langfeldt-Haaland sued Saupe Enterprises to recover for personal injuries sustained in an automobile accident. Pursuant to Civil Rule 35, Saupe moved for an order requiring that Svend submit to a physical examination by a physician selected by Saupe. Svend did not object, but asserted rights to record the exam and to have his attorney present. The court ordered Svend to submit to the examination without benefit of counsel or tape recording. We granted Svend's petition for review.

Civil Rule 35(a) provides in part:

> *Order for Examination.* When the mental or physical condition . . . 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. . . . 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 person examined is entitled to receive a written report of the examination. Civil Rule 35(b).

We have never addressed the question whether a party in a civil action has the right to have his attorney present during an examination by a physician hired by his opponent. Other courts have done so, with widely divergent results.

In California, a party compelled to submit to a physical examination is entitled to have an attorney present.[2] Moreover, either party is entitled to request the presence of a court reporter.[3] The fact that a court reporter is present does not preclude the attendance of plaintiff's attorney.[4] However, the party has no right to his attorney's presence during a psychiatric examination.[5]

Florida, New York, and Washington permit an attorney to attend both physical and psychiatric examinations as a matter of course.[6] In Montana, an attorney has the right to be present while a physician takes his client's medical history, but not during the

2. *Sharff v. Superior Court,* 44 Cal.2d 508, 282 P.2d 896, 897 (1955).

3. *Gonzi v. Superior Court,* 51 Cal.2d 586, 335 P.2d 97, 99 (1959).

4. *Munoz v. Superior Court,* 26 Cal.App.3d 643, 102 Cal.Rptr. 686, 687 (1972).

5. *Edwards v. Superior Court,* 16 Cal.3d 905, 130 Cal.Rptr. 14, 549 P.2d 846, 848-50 (1976).

6. *Bartell v. McCarrick,* 498 So.2d 1378, 1379 (Fla.App.1986); *Reardon v. Port Auth.,* 132 Misc. 2d 212, 503 N.Y.S.2d 233, 234-35 (1986); *Tietjen v. Department of Labor & Indus.,* 13 Wash.App. 86, 534 P.2d 151, 153-54 (1975).

physical examination.[7] In Oregon and Wisconsin, the burden is on the injured plaintiff to show good cause justifying the attorney's presence.[8] The federal rule, followed by several states,[9] is that the plaintiff's attorney may not attend an examination.[10]

The courts which do not permit attorney attendance reason that ethical problems may arise because the attorney may be called as a witness for his client.[11] Moreover, they wish to divest the examination of any adversary character.[12] The examinee is protected because he has access to the doctor's written report, and may depose the doctor and object to inadmissible evidence during trial.[13] Some courts also note that physicians may refuse to perform an examination in the presence of an attorney, that the attorney is likely to interfere, and that the patient's reactions may be skewed, rendering the examination useless.[14]

Those courts which permit an attorney to be present generally reason that the physician should be prevented from making inquiries beyond the legitimate scope of the exam, thus transforming the exam into a sort of deposition.[15] Moreover, the attorney's presence may aid in the eventual cross-examination of the physician.[16] The attorney need never be called as a witness for his client if the examination is tape recorded.[17] These courts refuse to presume that the attorney will interfere with the examination and recognize

7. *Mohr v. District Court,* 202 Mont. 423, 660 P.2d 88, 88 (1983).

8. *Pemberton v. Bennett,* 234 Or. 285, 381 P.2d 705, 706-07 (1963); *Whanger v. American Family Mut. Ins. Co.,* 58 Wis.2d 461, 207 N.W.2d 74, 79 (1973).

9. *E.g., Pedro v. Glenn,* 8 Ariz.App. 332, 446 P.2d 31, 33-34 (1968).

10. *McDaniel v. Toledo, P. & W. R.R.,* 97 F.R.D. 525, 526 (C.D.Ill.1983); *Dziwanoski v. Ocean Carriers Corp.,* 26 F.R.D. 595, 597-98 (D.Md.1960).

11. *McDaniel,* 97 F.R.D. at 526; *see* Alaska Code of Professional Responsibility DR 5-102 (attorney shall withdraw if he ought to be called as a witness for his client).

12. *McDaniel,* 97 F.R.D. at 526; *Pemberton,* 381 P.2d at 706; *Whanger,* 207 N.W.2d at 79.

13. *Warrick v. Brode,* 46 F.R.D. 427, 428 (D.Del.1969); *Dziwanoski,* 26 F.R.D. at 598; *Pedro,* 446 P.2d at 33; *Edwards,* 549 P.2d at 850 (psychiatric exam); *Mohr,* 660 P.2d at 89.

14. *Pedro,* 446 P.2d at 33 (psychiatric exam); *Edwards,* 549 P.2d at 849 (same); *Pemberton,* 381 P.2d at 706.

15. *Sharff,* 282 P.2d at 897; *Reardon,* 503 N.Y.S. 2d at 234-35; *Steele v. True Temper Corp.,* 174 N.E.2d 298, 301-02 (Ohio Common Pleas), *appeal dismissed,* 193 N.E.2d 196 (Ohio App.1961); *Tietjen,* 534 P.2d at 154.

16. *Reardon,* 503 N.Y.S.2d at 235; *Jakubowski v. Lengen,* 86 A.D.2d 398, 450 N.Y.S.2d 612, 613 (1982).

17. *Gonzi,* 335 P.2d at 99.

that the courts have the authority to deal with any actual interference.[18]

[1] In our view, those cases which allow the examinee's attorney to be present are the more persuasive. The Rule 35 examination is part of the litigation process, often a critical part. Parties are, in general, entitled to the protection and advice of counsel when they enter the litigation arena. An attorney's protection and advice may be needed in the context of a Rule 35 examination, and we see no good reason why it should not be available.

In *Houston v. State,* 602 P.2d 784, 792-96 (Alaska 1979), we held that a criminal defendant has the right to have his attorney present at a psychiatric examination conducted under a court order requested by the prosecution. This right is part of the right to counsel in criminal cases expressed in article I, section 11 of the Alaska Constitution.[19] *Id.* at 795.

Although we did not delineate the precise function of counsel at the examination, we expressed our belief that defense counsel's role would generally be passive in nature. *Id.* at 796 n. 23. We relied in part on the decision in *Lee v. County Court,*[20] wherein the New York Court of Appeals explained the passive function of counsel at a psychiatric examination:

> [T]he function of counsel is limited to that of an observer. . . . [T]he defense attorney may take notes and save [his] comments or objections for the trial and cross-examination of the examining psychiatrist.

However, we also cited with approval two Oregon cases which anticipated more active participation by counsel, namely, advising the client not to answer potentially incriminating questions posed by the psychiatrist.[21]

18. *Reardon,* 503 N.Y.S.2d at 235; *Jakubowski,* 450 N.Y.S.2d at 614; *Steele,* 174 N.E.2d at 302; *Tietjen,* 534 P.2d at 154.

19. Alaska Const. art. I, § 11 provides:

> In all criminal prosecutions, the accused . . . is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.*
> (Emphasis added).

20. 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452, 459, *cert. denied,* 404 U.S. 823, 92 S.Ct. 46, 30 L.Ed.2d 50 (1971), *quoted in Houston,* 602 P.2d at 794.

21. 602 P.2d at 793-94 & n. 19 (citing *State v. Corbin,* 15 Or.App. 536, 516 P.2d 1314 (1973) and *Shepard v. Bowe,* 250 Or. 288, 442 P.2d 238 (1968)); *see also Jakubowski,* 450 N.Y.S.2d at 613-14.

[2] *Houston* supports, by analogy, our conclusion that plaintiff's counsel in a civil case should have the right to attend a physical, or psychiatric, examination of his client in several respects. First, there is a constitutional right to counsel in civil cases arising from the due process clause.[22] We recognize that the right to counsel in civil cases is not co-extensive with the right to counsel in criminal prosecutions,[23] but in the area of compelled examinations we see no reason to draw a distinction. Second, counsel may observe shortcomings and improprieties in an examination which can be brought out during cross-examination at either a civil or criminal trial. Third, although observation may be the primary role of counsel in both criminal and civil cases, counsel may on occasion properly object to questions concerning privileged information. There are privileges which may be invaded in civil as well as in criminal cases. Thus the reasons for allowing counsel to be present in a criminal case which we accepted in *Houston* also generally apply in civil cases.

We align Alaska with those authorities which allow plaintiff's counsel to attend and record, as a matter of course, court-ordered medical examinations in civil cases.[24] The trial courts retain authority to enter appropriate protective orders under Civil Rule 26(c). The question whether defense counsel should also be allowed to attend the examination was not taken on review, and we express no opinion on this issue.

The order of the superior court requiring petitioner to submit to an unrecorded medical examination without the presence of counsel is REVERSED.

SEPARATE OPINION

MOORE, Justice, with whom COMPTON, Justice, joins, dissenting.

22. Alaska Const. art. I, § 7 provides: No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

23. Article I, section 11 applies only to "criminal prosecutions." *McCracken v. State*, 518 P.2d 85, 90 (Alaska 1974). Thus, an indigent person has no right to appointed counsel in most civil cases, although certain exceptions exist in the areas of termination of parental rights, *V.F. v. State*, 666 P.2d 42, 44-45 (Alaska 1983); child custody, *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979); paternity suits, *Reynolds v. Kimmons*, 569 P.2d 799, 803 (Alaska 1977); and civil contempt proceedings, *Otton v. Zaborac*, 525 P.2d 537, 538 (Alaska 1974).

24. If the client does not wish his or her attorney to attend all or part of an examination, these wishes must of course govern.

The court adopts a blanket rule that plaintiffs have a presumptive right to have their counsel attend medical examinations ordered pursuant to Alaska Rule of Civil Procedure 35. This ruling presents grave policy concerns as well as practical problems for litigants, their counsel and the medical profession. Furthermore, this ruling departs from both the terms of Rule 35 and Alaska case law.

This ruling is premised on the assumption that most physicians hired to conduct independent medical examinations are nothing more than "hired guns." The assumption that most physicians will exceed the legitimate scope of such exams unless checked by the presence of opposing counsel denigrates the professionalism and objectivity of the medical profession. While cases of abuse certainly may exist, I submit that these situations are more appropriately dealt with on a case-by-case basis by the use of protective or preclusion orders authorized under our rules of civil procedure.

A presumptive rule allowing counsel into medical exams interjects an adversarial, partisan atmosphere into what should otherwise be a wholly objective inquiry. Many reputable physicians will be loath to perform such medical examinations if they become dominated by opposing counsel.[1] This rule is yet another intrusion into an area which should be properly the province of the physician. Much conflict has arisen lately between the legal and medical professions. As one commentator has noted, the time has come for each profession to cooperate and respect the role of their counterpart. LeBang, *Professionalism and Interprofessional Cooperation Between Physicians and Attorneys,* 12 S.Ill. U.L.J. 507 (1988).

I firmly believe that this court should follow the general approach developed over the last thirty years by the federal courts in interpreting Federal Rule of Civil Procedure 35. Alaska Rule of Civil Procedure 35 and the Federal Rule are identically worded. This court has repeatedly found federal authorities to be persuasive when interpreting a similarly worded Alaska rule. *Drickersen v. Drickersen,* 546 P.2d 162, 167 n. 9 (Alaska 1976) (Alaska Rules 13(g) and 14(a)); *Fenner v. Bassett,* 412 P.2d 318, 321 (Alaska 1966) (Alaska Rule 12(d)). Federal courts have consistently held that a plaintiff is not entitled to have his or her attorney present at

1. Indeed in this case, the physician hired by Saupe Enterprises to examine Sevand refused to perform the first medical exam because "he thought that the tape recording of the exam was a 'foot in the door' tactic of counsel to intrude into and dominate medical examinations, and that doctors should not consent to perform examinations under such conditions."

a Rule 35 examination.[2] As the federal court reasoned in *Dziwanoski v. Ocean Carriers Corporation,* 26 F.R.D. 595, 596-97 (1960):

> [I]t is desirable that once an examination be ordered, the procedure should be divested, as far as possible, of any adversary character. The physician is an 'officer of the Court' performing a non-adversarial duty. The best possible attitude for both the party and the examiner is one of cooperation in a joint search for facts. The very presence of a lawyer for one side will inject a partisan role into what should be a wholly objective inquiry. The attorney has ample opportunity to challenge the use made of the information obtained by the examination when the findings are presented as evidence in Court.

Other courts have recognized that the presence of counsel at medical exams will skew the reactions of the patients, perhaps rendering the examination useless.[3] Counsel are likely to interfere with the exam, objecting to normal medical procedures and to questions posed by the examining physician.

The court ignores the practical problems posed by its ruling. Will counsel be able to interrupt exams to seek rulings by trial court judges on the propriety of doctors' questions or procedures? What about the exacerbated scheduling problems posed by counsel, clients and doctors? Finally, what about the right of opposing counsel to also attend these examinations or those of non-treating expert doctors hired by plaintiff for trial? The court dodges the critical question of defense counsel's role by stating that the issue was not raised in the trial court. By failing to consider the right of opposing counsel to also attend medical exams under Rule 35, the court provides a special tool to one side without considering its full impact on the carefully crafted balancing of interests set forth in the rule.

The court contends that the defendant is "represented" at the exam by her selected physician. However, most physicians are not legally trained and will not be in a position to respond to the legal objections raised by any counsel, nor should they be. If defendants are to be fairly treated, they should have the corresponding right to have their counsel attend these examinations. Or why should

2. *McDaniel v. Toledo, P. & W. R.R.,* 97 F.R.D. 525, 526 (C.D.Ill.1983); *Brandenberg v. El Al Israel Airlines,* 79 F.R.D. 543, 546 (S.D.N.Y. 1978); *Warrick v. Brode,* 46 F.R.D. 427, 428 (D.Del.1969); *Dziwanoski v. Ocean Carriers Corp.,* 26 F.R.D. 595, 597-98 (D.Md.1960).

3. *See Pedro v. Glenn,* 8 Ariz.App. 332, 446 P.2d 31, 33 (1968) (psychiatric exam); *Edwards v. Superior Court,* 16 Cal.3d 905, 130 Cal.Rptr. 14, 549 P.2d 846, 849 (Cal.1976) (same); *Pemberton v. Bennett,* 234 Or. 285, 381 P.2d 705, 706 (1963).

not defendants be given the reciprocal advantage of attending examinations by doctors hired by the plaintiff for purposes of preparing for trial? When viewed in its full implications, it becomes clear that this ruling threatens to turn medical exams into mini-depositions dominated by legal theatrics rather than medical fact finding. Counsel, who for the most part lack any special training in medical matters, will have unbridled discretion over the way a doctor examines the plaintiff. This, of course, assumes that doctors will even agree to do these exams under such onerous conditions.

The court's decision flies in the face of the language of Alaska Rule 35 itself and the protective scheme it provides. Rule 35 was adopted to provide defendants with equally unimpaired opportunity to evaluate the physical condition of the plaintiff. Plaintiff's counsel has already been afforded this unimpaired opportunity to evaluate his or her client's condition through examinations by the treating physician and any special experts hired in the course of litigation. The rationale of the rule is that fundamental fairness dictates that the defendant be given a similarly unimpaired opportunity to examine the plaintiff.[4]

The rule protects the interests of the plaintiff by requiring the production of the examining doctor's report. Moreover, under the federal rule, plaintiffs may elect to have their own physician present during the examination.[5] Rule 35(b) therefore provides a method for plaintiff's counsel to discover the extent, scope and results of the exam without intruding into the examination room and threatening the effectiveness of the exam.[6] Plaintiff's attorney may depose the doctor and object to inadmissible evidence during trial.[7] By interjecting counsel into every exam, the court disrupts the rule's careful balancing of each party's interests. As the *Dziwanoski* court explained:

4. *See Dziwanoski,* 26 F.R.D. at 597 (quoting *Bowing v. Delaware Rayon Co.,* 38 Del. 206, 190 A. 567, 569 (1937)).

5. *Brandenberg,* 79 F.R.D. at 546; *Warrick,* 46 F.R.D. at 428; *Dziwanoski,* 26 F.R.D. at 598.

6. The court states that even if improper evidence obtained at a medical examination is excluded at trial, the defendant will also benefit from having the improper information. These rare circumstances of abuse must be balanced against the threats posed by attorney interference on the rights of all defendants to an unhindered evaluation of plaintiff's condition. The latter situation is likely to occur far more frequently and thus outweighs the threat posed by use of excluded information by defendants.

7. *See Warrick,* 46 F.R.D. at 428; *Dziwanoski,* 26 F.R.D. at 598; Pedro, 446 P.2d at 33; *Edwards,* 549 P.2d at 850 (psychiatric exam); *Mohr v. District Court,* 202 Mont. 423, 660 P.2d 88, 89 (1983).

> In the absence of a . . . rule similar to Rule 35 it has been generally held that the attorney for the examined party may be present at such an examination. See cases collected in 64 A.L.R.2d 497, 501 (sec. 5). *On the other hand, it has been held that where the examination is authorized by a . . . rule which provides some protection devices but does not provide for the presence of counsel, the result should be otherwise.*

26 F.R.D. at 597 (emphasis added).[8]

The court's reasons for departing from this precedent are not persuasive. The majority relies on *Houston v. State,* 602 P.2d 784 (Alaska 1979), a criminal right to counsel case, to justify its decision to impose a general right to counsel for plaintiffs in all Rule 35 medical examinations. While the court claims to recognize the difference between the constitutional right to counsel in criminal cases[9] versus that of civil cases[10] under the Alaska Constitution, it fails to take this difference into account when considering the costs and benefits of their new rule. Far more protection is granted to defendants in a criminal action and consequently, the state is expected to undergo greater burdens in proving its case. The same is not true in civil cases. In fact, in personal injury civil cases, the need for, or even a request for, a psychiatric exam is rare. On the other hand, in criminal cases, such a need or request is the norm and is usually expected from defense counsel.

The *Houston* decision to allow counsel to attend psychiatric exams was based on a criminal defendant's constitutional right to confront and cross-examine witnesses. 602 P.2d at 795. The court concluded that the added benefit to the criminal defendant's counsel in cross-examining the psychiatrist justified allowing defendant's counsel to attend the psychiatric interview. *Id.* at 795-6.

This reasoning is simply not applicable to civil exams under Rule 35. Without the right of confrontation to justify the risks of disruption of the psychiatric interview, the benefits of more informed cross-examination and the rare instances where a counsel's presence may prevent an improper question do not outweigh the burdens imposed by counsel's attendance at an exam. In sum, the *Houston* experience, on which this court relies, does not justify such a broad rule in civil cases.

8. If this court wishes to amend Rule 35, it would be far wiser to allow the Civil Rules Committee to solicit the advice of practitioners, physicians and other parties so as to allow for a more thorough examination of any reasons for reform.

9. Alaska Constitution article I, § 11.

10. The due process protections of the Alaska Constitution are provided in article I, § 7.

Finally, Svend contends that his right to counsel at a Rule 35 exam derives in part from his right to privacy. It seems likely that the ruling Svend seeks will ultimately intrude on a litigant's privacy more than the infrequent cases of improper medical exams the majority's new rule seeks to prevent. In most cases, the presence of counsel, tape recorders or video cameras in the doctor's examination room will likely compound rather than minimize the intrusion on the privacy of the examinee. With the adoption of this rule, counsel will feel compelled to attend all examinations. Moreover, plaintiffs will be subjected to greater potential embarrassment by having third parties in the examination room because plaintiffs will feel that the successful litigation of their claims somehow requires it.

I cannot subscribe to a broad rule that assumes physicians will act unprofessionally when conducting medical examinations under Rule 35. The infrequent cases of abuse are better handled through the use of special protective orders granted by the trial court on a case-by-case basis.

There are no allegations of improprieties, past or present, by the doctor involved in *this* case. Accordingly, I would affirm the trial court's order granting the exam with no requirement that it be tape recorded or that Svend's counsel be present.

State v. Johnson, No. S-8669 (Alaska 05/05/2000)

[1] THE SUPREME COURT OF THE STATE OF ALASKA

[2] Supreme Court Nos. S-8669/8670

[3] 2000.AK.0042101 <http://www.versuslaw.com>

[4] May 5, 2000

[5] **STATE OF ALASKA, DEPARTMENT OF CORRECTIONS, APPELLANT/CROSS-APPELLEE,**
V.
GARRY JOHNSON, APPELLEE/CROSS-APPELLANT.

[6] Superior Court No. 3AN-96-173 CI

[7] Appearances: Thomas J. Slagle, Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellant and Cross-Appellee. Thomas V. Van Flein and Craig F. Stowers, Clapp, Peterson & Stowers, Anchorage, for Appellee and Cross-Appellant.

[8] Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, and Carpeneti, Justices.

[9] The opinion of the court was delivered by: Fabe, Justice.

[10] OPINION

[11] [No. 5269 - May 5, 2000]

[12] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Rene J. Gonzalez, Judge.

[13] I. INTRODUCTION

[14] The State appeals a jury verdict in favor of Garry Johnson, a former inmate at the Ketchikan Correctional Center, for damages he suffered when a swinging door knocked him down a stairway. Because the superior court incorrectly instructed the jury on the duty of care that the State must exercise when building a jail, we reverse. Although we remand on the issue of whether the State breached its duty to Johnson, we find no error tainting

either the jury's finding that Johnson's fall caused his injuries or its calculation of damages. We therefore remand for a new trial limited to the issue of whether the State breached its duty to exercise reasonable care in the construction of the Ketchikan jail.

[15] II. FACTS AND PROCEEDINGS

[16] One evening in February 1994 Garry Johnson was returning to his cell at the Ketchikan Correctional Center. As he climbed to the landing at the top of the stairs, he turned to speak to a fellow inmate. At this precise moment, his cell mate, Thomas Coen, opened the cell door, striking Johnson and knocking him off the landing and down the stairs. Johnson fell to the base of the stairs, where he lay unconscious.

[17] Johnson has suffered severe medical hardship since the accident. Dr. Susan Hunter-Joerns testified that the fall damaged the sacral root nerves that control urinary, bowel, and erectile function. The accident has impaired these functions severely and permanently. Johnson must use a catheter and wear adult incontinence protection devices for the rest of his life.

[18] Johnson sued the State for his injuries. The State filed a third-party complaint against Thomas Coen in an attempt to assign a portion of the fault to him for opening the door.

[19] Less than a month before trial, and after discovery had closed, the State sought an independent medical evaluation (IME) of Johnson. Despite the close of discovery, Johnson's counsel cooperatively agreed to allow the IME but did not waive Johnson's right to have counsel present at the examination. Although the State scheduled the IME for a date several weeks later, it did not reveal this information to Johnson's counsel, purportedly because of security concerns about transporting a prisoner. The State made no effort to notify Johnson's counsel of the scheduling for the IME until one-half hour before the exam took place. Even then, counsel for the State just left a voice-mail message for Johnson's attorney. That message, however, concerned only general matters and failed even to mention the impending IME. The IME entailed many invasive and painful procedures; yet Johnson's counsel did not learn of it until afterward. After a hearing on the issue, the superior court excluded the testimony of the examining physician, Dr. John Keene.

[20] At trial Johnson contended that the stair landing from which he fell was too short. At the time the State received the building permit for the jail in 1980, Alaska had adopted the 1970 version of the Uniform Building Code (UBC). The 1970 UBC required forty-eight-inch-deep stair landings, and the jail complied with that requirement. But state law requires the state's public buildings to comply with local building codes as well. *fn1 Before the State received its building permit, Ketchikan had adopted the 1979 UBC, which required sixty-inch stair landings -- a full foot longer than the landing in front of Johnson's cell. Prior to Johnson's accident, however, both the State and Ketchikan adopted the 1991 UBC, which required only forty-four-inch landings. All of the trial experts agreed that the landing complied with the 1991 UBC in effect at the time of the accident.

[21] Johnson filed a pretrial motion, seeking a ruling that the State's construction of the landing was negligent per se. The State filed a cross-motion, arguing that the building code effective at the time of injury defined the standard of care. The superior court ruled that

the State violated the Ketchikan building code that was in effect when the building permit was issued, but refused to give the requested negligence per se instruction. Instead, the court ruled that "the finder of fact may consider the State's violation of [the] 1979 UBC . . . as evidence of negligence." Despite the pretrial ruling, the actual instruction given to the jury stated: "You are instructed to consider the State's violation . . . as evidence of negligence."

[22] The trial began on October 13, 1997 and lasted almost two weeks. At trial the parties disputed the standard of care owed by a jailer to a prisoner. The State asserted that the standard required the jailer only to exercise "reasonable care for the safety of his prisoners." But the court instructed the jurors that the jailer owed Johnson the duty of "utmost care."

[23] The State also objected repeatedly to Johnson's closing argument. In the argument, Johnson's counsel told a fictional story in the first person about an accident that his own wife had allegedly suffered. The described facts of this incident were almost identical to those of Johnson's accident. Upon each of the State's three objections, the court instructed the jury that plaintiff's counsel was using an analogy. Johnson's counsel admitted as much but only at the story's conclusion. The State argues that this argument had no support in the evidence and that allowing it constituted reversible error.

[24] The State also argues that the court erred when it removed the question whether Johnson suffered from "severe physical impairment" from jury consideration and ruled that the statutory $500,000 cap on non-economic damages did not apply to Johnson.

[25] The jury found the State one hundred percent negligent, assigning no comparative negligence to Johnson or his cell mate Coen. The jury awarded $2,050,000 in damages, including $1,250,000 in past and future non-economic damages. After the court added attorney's fees and interest, it entered a final judgment of $2,356,292.55. The superior court rejected the State's motion for a new trial, and the State appeals.

[26] In his cross-appeal Johnson disputes the superior court's failure to take judicial notice of the Occupational Safety and Health Administration (OSHA) regulations that he claims show that the jail violated federal safety standards.

[27] III. STANDARD OF REVIEW

[28] Assessing the validity of jury instructions involves questions of law, which are subject to our independent review. *fn2 An error in jury instructions will be grounds for reversal only if it caused prejudice. *fn3

[29] We review the superior court's exclusion of expert witnesses for an abuse of discretion. *fn4 A trial court abuses its discretion if exclusion of an expert "determin[es] a central issue in the litigation," unless the party seeking to admit the expert acted willfully to gain an advantage in the litigation. *fn5

[30] IV. DISCUSSION

[31] A. The Superior Court Committed Prejudicial Error When It Instructed the Jury that the State Owed Johnson a Duty to Exercise the Utmost Caution.

[32] The standard in Wilson v. City of Kotzebue *fn6 requires the State to exercise "reasonable care for the protection of [the prisoner's] life and health." *fn7 Because prisoners often cannot avail themselves of opportunities for self-protection, the reasonable care standard periodically requires the jailer to exercise more then ordinary care. *fn8 The "amount of risk or responsibility" involved in holding a prisoner may dictate that a jailer must exercise the "utmost caution" to "assist a prisoner who is in danger." *fn9 Acknowledging this duty as utmost caution is really just a way of restating the requirement that the jailer must exercise reasonable care under the circumstances. *fn10

[33] Reasonable care in these circumstances did not require the State to exercise the "utmost caution" because Johnson was not in any unique danger and was able to protect himself.

[34] The superior court instructed the jury:

[35] One who is required by law to take or who voluntarily takes the custody of another, under circumstances which deprive the other of his normal opportunities for protection, has a duty to exercise the utmost caution to protect that person against unreasonable risk of harm. Such a duty encompasses the jailer's duty to guard against risk of injury to his prisoners. (Emphasis added.)

[36] In this case, however, Johnson had an opportunity to protect himself. Johnson was neither incapacitated nor did the terms of his custody impair his ability to exercise caution on the stairway. He had the same opportunity as any other stairway user, such as a guard or other prison employee, to avoid being knocked off the landing by the swinging door. Being in custody did not place Johnson "in danger" that would have triggered the State's duty to exercise more then ordinary care. *fn11

[37] This case does not present any of the concerns that led us in Wilson to characterize the standard of care as one of "utmost caution." *fn12 In Wilson *fn13 and Kanayurak v. North Slope Borough, *fn14 we pointed to circumstances that would justify the "utmost caution" instruction. In these cases we held that the jailer must exercise a higher degree of care when the jailer knows or reasonably should have foreseen that the prisoner was incapacitated, suicidal, or otherwise "in danger." *fn15 Because Johnson could have exercised the same amount of care as any other stairway user, the superior court should not have instructed the jury that the State owed him the utmost care. *fn16

[38] Moreover, the State should employ the same safety standards for stairways in all state buildings. The need for safety in a state building's design is not peculiar to a prison. And the fact that the State compels Johnson to reside in the prison does not in itself warrant a heightened duty. If the State owed the utmost care to those it compelled to be in a particular building, then the heightened duty would extend to individuals subpoenaed to appear at a courthouse *fn17 or students required to attend school. *fn18 We do not hold

the State to the duty of utmost care in either of these circumstances.

[39] Because Johnson was not "in danger" as contemplated by the court in Wilson, the situation did not permit an instruction more stringent than reasonable and prudent care under the circumstances. The instruction made a verdict for the plaintiff more likely; therefore we reverse and remand for a new trial.

[40] We now proceed to address the other issues on appeal in order to provide guidance to the trial court on remand. In doing so we conclude that the trial court committed no error that would affect the jury's finding that Johnson's fall caused his injuries or its calculation of damages. When no error taints a portion of the jury's verdict and we believe the interests of justice and judicial economy dictate, a remand for a new trial may be limited to the issues affected by the error. *fn19 Accordingly, on remand the trial should be limited to the issue of whether the State was negligent in designing and building the stairway to Johnson's cell.

[41] B. The Superior Court Acted Within Its Discretion When It Excluded Dr. Keene's Testimony.

[42] The examination that Dr. Keene conducted without Johnson's counsel present violated Johnson's right to have an attorney present during a Rule 35 exam. *fn20 We have recognized that right explicitly. *fn21 A Rule 35 exam is "often a critical part" of the litigation process, *fn22 making this right more than a procedural protection. *fn23 Having counsel present is a right that may protect the examinee from invasive, painful procedures and questions that exceed the proper scope of the exam. The presence of counsel may also facilitate future cross-examination of the examining physician. *fn24 Because Johnson had a right to counsel during a Rule 35 examination, we give great deference to the trial court's sanction protecting it.

[43] The exclusion of Dr. Keene's testimony and his exam report was an appropriate sanction under Rule 37(b)(3). *fn25 The State only sought an IME after discovery had closed and the trial date approached. Johnson's counsel nevertheless agreed to allow the examination but expressed his desire to be present. Despite this request, the State scheduled and conducted the exam, failing to provide any notice to Johnson's counsel that it would be taking place.

[44] The State's reliance on a Department of Corrections policy requiring the transportation of prisoners to be confidential does not justify the State's failure to notify counsel. This policy is only a broad guideline, providing that "[p]risoner transportation will be treated as confidential information." The State presented no evidence that informing Johnson's counsel would create a security risk. The State routinely informs attorneys of their clients' transportation while keeping this information from the public for security reasons. A simple request of counsel to keep the time and place confidential would have sufficed to allay the State's concerns.

[45] The State concedes that it did not attempt to contact Johnson's attorney until thirty minutes before the exam. Even then the voice mail that the State left with Johnson's counsel failed to mention the imminent exam. Johnson's counsel did not learn of the exam until after it had taken place. The State's conduct exhibited utter disregard for Johnson's right to have

an attorney present.

[46] The State's discovery violation is especially egregious considering the invasive, painful nature of the exam. Dr. Keene performed an "anal wink" test, in which he poked the tissue surrounding Johnson's anus with a sharp medical instrument. Dr. Keene also performed a cystometrogram, in which he inserted a tube into Johnson's penis and filled his bladder with fluid to the point of causing severe pain.

[47] Moreover, the court's ruling did not preclude the State from offering evidence on the issue of causation. The State cites Sykes v. Melba Creek Mining, Inc. *fn26 for the proposition that a showing of willfulness is necessary under Rule 37(b)(3) when exclusion of a witness effectively determines an issue. Our decision in Sykes is not controlling in this case, however, because the trial court's decision was not issue determinative. The State could have procured other evidence on the causation issue, including the testimony from one of the many doctors who has examined Johnson.

[48] Because Dr. Keene's exam violated Johnson's substantive rights and its exclusion did not determine an issue against the State, we conclude that the superior court acted within its discretion when it condemned the State's deliberate conduct, excluded Dr. Keene's testimony, and refused to allow another invasive exam.

[49] C. On Remand the Superior Court Should Instruct the Jury to Consider Violation of the 1979 Building Code as Evidence of Negligence.

[50] The parties have disputed the importance of the State's violation of the 1979 UBC, which was effective at the time of construction but had been relaxed before Johnson's injury. The trial court correctly resolved this issue before trial when it concluded that "the finder of fact may consider the State's violation of 1979 UBC Sec. 3303(i) as evidence of negligence." But the State's proposed instructions state the law more accurately than that of the instruction that the superior court actually gave.

[51] 1. The superior court correctly refused to issue a negligence per se instruction.

[52] Johnson argues that the superior court should have issued a negligence per se instruction. In determining whether a negligence per se instruction is appropriate, the trial court must conduct a two-step inquiry. *fn27 First, it must analyze "whether the conduct at issue is under the ambit of the statute according to the criteria set out in Restatement (Second) of Torts § 286." *fn28 Second, upon a finding that an injury falls within the ambit of the statute, the trial court must decide whether to exercise its limited discretion to refuse the negligence per se instruction. *fn29

[53] This discretion is appropriately exercised, however, when the law is obsolete:

[54] Obviously, cases will be relatively infrequent in which legislation directed to the safety of persons . . . will be so obsolete, or so unreasonable, or for some other reason inapplicable to the case, that the court will take this position; but where the situation calls for it, the

court is free to do so.[*fn30]

[55] Even if the 1979 UBC, which required sixty-inch landings, applied to the State at the time of construction, both Ketchikan and the State had repealed it at the time of injury. Because the applicable law had changed such that the State's purportedly negligent design now complied with the statute, the superior court acted appropriately when it denied the negligence per se instruction. As the superior court observed: "It would be absurd for this court to declare, through a finding of negligence per se . . . that a 48 inch landing is not reasonable when in fact the standard for new construction at the time of the accident held that as little as 44 inches [was] an acceptable length for a landing . . . ." We agree with the superior court's analysis and conclude that a negligence per se instruction was not appropriate.

[56] This decision will not, as Johnson contends, spawn a flood of litigation over buildings that complied with old building codes but do not meet the current requirements. First, the grandfathering regulation states that conditions not in strict compliance with the amended building code may continue where they do not constitute a distinct hazard to life or health. *fn31 Second, we confine our holding that the appropriateness of the negligence per se instruction depends on the code at the time of injury to situations where amendments to the UBC bring a pre-existing code violation into compliance.

[57] Nor does our recent decision in Cable v. Schefik *fn32 compel us to reach the conclusion that a negligence per se instruction was appropriate in this case. In Cable we held that the trial court abused its discretion when it did not issue a negligence per se instruction and merely submitted the violation as evidence of negligence. *fn33 But in Cable the general safety code provision that the defendant violated was in effect at the time of the accident. *fn34 In this case the State was not in violation of the UBC at the time of the accident. The landing's compliance with the current code justifies an instruction on the past violation as "evidence of negligence" rather then negligence per se.

[58] Although Johnson's injury may have fallen within the ambit of the statute, the statute was obsolete at the time of injury. Thus, the court correctly refused to grant a negligence per se instruction.

[59] 2. On remand the superior court should instruct the fact finder that it may consider the UBC violation as evidence of negligence.

[60] The State argues that although the superior court correctly ruled before trial that the jury "may consider the State's violation of [the] 1979 UBC . . . as evidence of negligence," it improperly gave Instruction 32, which told the jury "to consider the State's violation of the 1979 U.B.C. . . . as evidence of negligence." *fn35 According to the State, the superior court reversed the law of the case by issuing what amounted to a negligence per se instruction despite its earlier ruling denying such an instruction. *fn36 While the superior court's pretrial ruling was correct, the instruction actually given amended and expanded the court's pretrial decision. Because the jury could have interpreted this instruction as compelling it to consider the UBC violation as evidence of negligence when it would be free either to accept or reject the evidence, the State's proposed instructions more accurately state the law. *fn37 On remand the trial court should issue an instruction that allows the jury either to accept or reject the UBC violation as evidence of negligence.

[61] D. The Superior Court Correctly Directed a Verdict Holding the Non-economic Damages Cap Inapplicable to Johnson Because He Suffered a Severe Physical Impairment.

[62] The superior court appropriately directed a verdict for Johnson on the issue of the applicability of the statutory cap on damages. Former AS 09.17.010 *fn38 imposes a $500,000 cap on non-economic damages unless the victim has suffered "severe physical impairment." *fn39 The question whether a plaintiff suffers from a severe physical impairment is one of fact, which would normally be presented to the jury. *fn40 In this case, however, the superior court appropriately removed the question from the jury because "reasonable persons could not differ in their judgment as to the facts." *fn41 The plaintiff presented medical experts who testified that Johnson suffered from a severe physical impairment. The State presented no contrary evidence.

[63] And although the State replies by listing the parts of Johnson's body that were not impaired or damaged by the accident, this argument ignores the overwhelming testimony that Johnson suffers from a severe physical impairment:

[64] Q: Doctor, is Garry Johnson's condition, as you understand it, with regard to bowel, bladder, and erectile dysfunctions, is it permanent?

[65] A: As far as we can tell, yes.

[66] Q: Does it constitute physical impairment?

[67] A: You bet. And . . . people will put up with back pain fairly readily, and leg pain, or missing fingers . . . , but when you start affecting their bowel, their bladder and their erectile []function, you're real close to home. This is a major disability.

[68] Q: And on a scale of mild, moderate to severe, how would you rate it?

[69] A: Severe, he's lost the bowel and bladder and all . . . erectile []function, it can't get any worse than that.

[70] The evidence was undisputed that Johnson has permanently lost urinary and bowel function. Johnson must use a catheter and wear an adult incontinence protection product every day for the rest of his life. Because permanently losing the normal use of a body system necessary for day-to-day life constitutes severe physical impairment, *fn42 the superior court properly removed this issue from the jury's consideration. *fn43

[71] E. Johnson's Closing Argument Was Improper.

[72] In closing argument Johnson's counsel gave a fictional account of an accident allegedly suffered by his wife. Johnson's counsel told the story in the first person and did not

acknowledge it was untrue until he had concluded his account.

[73] The fictional accident was similar to that suffered by Johnson:

[74] My wife and I . . . took a trip to Juneau this past February, and we visited the state museum . . . . And when we went up . . . this flight of stairs that led to an art gallery, and it was down kind of a narrow hall and they would have smaller art objects hanging on the wall. . . .

[75] . . . [S]he was walking up the stairs ahead of me, and she got to the top of the stairs and I said honey, look, and I pointed down the hall because there were some really neat paintings hanging on the wall. And she stopped at the top of the landing and she turned and -- because I had called to her, and she turned . . . and unbeknownst to either of us, this door opened. And subsequently, I found out it was a really heavy metal door that swung open. . . . [I]t bumped her as she was standing, and she lost her balance and she fell down the stairs. . . .

[76] And I ran to her . . . and there was no response, but she was shaking and spasming and . . . I was scared, I really was. . . .

[77] But I have a friend who's an engineer in Juneau, and I contacted him . . . about the situation.....

[78] And I asked him . . . if he'd look into this, and he said . . . he would be happy to. . . . He got back to me and told me, that [this door violated the building code]. . . .

[79] And that brings up another subject, that's the subject of what's wrong with [my wife]. The doctors say she -- well she's been urinating in a bag, using a catheter the entire time since this fall. And in order to go to the bathroom . . . she has to use an enema . . . . And I don't know, could you look into this case for me, because this is what I'm dealing with.

[80] The trial judge counteracted the misleading nature of the argument by telling the jury on three occasions that it was just an analogy. But without such admonitions, counsel's argument could have confused the jury, causing it to believe that the "facts" of the story were evidence in the case or that the State had negligently designed another state building. Although the use of analogies is certainly an approved technique for closing argument and may counteract prejudice toward an unsympathetic client, *fn44 Johnson's counsel could have avoided all possible confusion by positing the story as a hypothetical at the outset of closing argument. In the event that counsel for Johnson wishes to make a similar closing argument on retrial, the trial court should ensure that this happens. *fn45

[81] V. CONCLUSION

[82] The superior court erred when it instructed the jury that the State owed Johnson a duty of "utmost care." Because the jury could have found the State liable for violating the duty of

"utmost care" but not liable under the appropriate "reasonable care" standard, the error was prejudicial. Consequently, we REVERSE and REMAND for a new trial. Because we find no error tainting the jury's verdict regarding causation and the calculation of damages, we limit the issue at the new trial to whether the State was negligent in designing and building the Ketchikan Correctional Center.

Opinion Footnotes

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[83] *fn1 See AS 35.10.025.

[84] *fn2 See Sever v. Alaska Pulp Corp., 931 P.2d 354, 361 n.11 (Alaska 1996).

[85] *fn3 See Coulson v. Marsh & McClennan, Inc., 973 P.2d 1142, 1150 n.21 (Alaska 1999).

[86] *fn4 See Fairbanks N. Star Borough v. Lakeview Enters., Inc., 897 P.2d 47, 58 (Alaska 1995).

[87] *fn5 Sykes v. Melba Creek Mining, Inc., 952 P.2d 1164, 1170 (Alaska 1998) (quoting Alaska R. Civ. P. 37(b)(3)).

[88] *fn6 627 P.2d 623 (Alaska 1981).

[89] *fn7 Id. at 628.

[90] *fn8 See id.

[91] *fn9 Id. (emphasis added).

[92] *fn10 See id.; see also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 34 (5th ed. 1984).

[93] *fn11 Wilson, 627 P.2d at 628.

[94] *fn12 Id. at 628-29. We reserve the question of precisely which circumstances justify the "utmost caution" instruction.

[95] *fn13 Id. In Wilson an intoxicated prisoner started a fire in his cell, but the jailers failed to confiscate his lighter. The second fire set by the prisoner caused his injuries. See id. at 626.

[96] *fn14 677 P.2d 893, 897 (Alaska 1984). In Kanayurak the prisoner was intoxicated and experiencing hardship in her family life. See id. at 894-95. In reversing a grant of summary judgment, we held that a genuine issue of material fact existed as to whether the jailer should have recognized that the prisoner was prone to commit suicide, thus holding him to a duty to take action to prevent it.

[97] *fn15 Wilson, 627 P.2d at 628-29; Kanayurak, 677 P.2d at 898-99. To justify requiring more than ordinary care in some circumstances, the Wilson court analogized to the special relationship between a common carrier and its passengers. This analogy is only warranted in special situations when circumstances unique to prisoners and known to or reasonably foreseeable by the jailer endanger the prisoner. See Wilson, 627 P.2d at 628.

[98] *fn16 Another jurisdiction requires a jail designer to build the jail "safe for its intended use." Tittle v. Giattina, Fisher & Co., Architects, Inc., 597 So. 2d 679, 681 (Ala. 1992); see also La Bombarbe v. Phillips Swager Assocs., Inc., 474 N.E.2d 942, 944 (Ill. App. 1985).

[99] *fn17 See AS 09.50.010(10) (allowing a judge to hold people who disregard a subpoena in contempt of court); Alaska R. Crim. P. 17(g).

[100] *fn18 See AS 14.30.10 (requiring children aged 7 to 16 to attend school).

[101] *fn19 See Fancyboy v. Alaska Village Elec. Coop., Inc., 984 P.2d 1128, 1136 (Alaska 1999); General Motors Corp. v. Farnsworth, 965 P.2d 1209, 1222-23 (Alaska 1998); Sturm, Ruger & Co. v. Day, 615 P.2d 621, 624 (Alaska 1980).

[102] *fn20 Alaska R. Civ. P. 35 (authorizing courts to order a party to submit to a physical or mental exam upon a showing of good cause and proper notice to the party to be examined, when the physical or mental condition of a party is at issue).

[103] *fn21 See Langfeldt-Haaland v. Saupe Enters., Inc., 768 P.2d 1144, 1147 (Alaska 1989) ("We align Alaska with those authorities which allow plaintiff's counsel to attend and record, as a matter of course, court-ordered medical examinations in civil cases.").

[104] *fn22 Id. at 1146.

[105] *fn23 The State has attempted to distinguish Langfeldt-Haaland because the examination was not court-ordered but by agreement of the parties. It is unclear why this distinction is relevant, especially in light of Rule 35(b)(3), which extends 35(b)'s other protections to examinations by agreement.

[106] *fn24 See Langfeldt-Haaland, 768 P.2d at 1145.

[107] *fn25 This rule, which governs the imposition of discovery sanctions, provides: Prior to making an order . . . the court shall consider (A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose; (B) the prejudice to the opposing party; (C) the relationship between the information the party failed to disclose and the proposed sanction; (D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and (E) other factors deemed appropriate by the court or required by law. The court shall not make an order that has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully.

[108] *fn26 952 P.2d 1164, 1170 (Alaska 1998).

[109] *fn27 See Cable v. Shefchik, 985 P.2d 474, 477 (Alaska 1999).

[110] *fn28 Those criteria are: The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results. Restatement (Second) of Torts § 286 (1971) (quoted in Cable, 985 P.2d at 477 n.2).

[111] *fn29 See Cable, 985 P.2d at 477.

[112] *fn30 Northern Lights Motel v. Sweaney, 561 P.2d 1176, 1184 (Alaska 1977) (quoting Restatement (Second) of Torts § 286 cmt. d).

[113] *fn31 See 13 Alaska Administrative Code (AAC) 55.030(a) (1998).

[114] *fn32 985 P.2d 474.

[115] *fn33 See id. at 478-79.

[116] *fn34 See id. at 477-79.

[117] *fn35 Instruction 32 reads in its entirety: You are instructed that at the time the Ketchikan Correctional Center was built, Alaska law under AS 35.10.025 provided as follows: A public building shall be built in accordance with applicable local building codes. . . . This section applies to all buildings of the state . . . . . [A]t the time of the facility planning and construction, the State was bound under AS 35.[1]0.025 to follow the local building

codes of the City of Ketchikan . . . . Ketchikan's local building code includes Sec. 3303(i) of the 1979 Uniform Building Code which required that a landing to a stairway that had a door opening over it was to have a minimum length of five feet. Therefore, the landing in question was in violation of the 1979 Uniform Building Code. You are instructed to consider the State's violation of 1979 U.B.C. Sec. 3303(i) as evidence of negligence. This court has not determined as a matter of law, whether or not the violation of any building code by the State of Alaska was a proximate cause of injury to Mr. Johnson. That is for you to determine as the finder of fact.

[118] *fn36 Johnson argues that the State failed to object to Instruction 32. But the State did object to a negligence per se instruction. Because we conclude that Instruction 32 amounted to a negligence per se instruction, the State's objection was not waived.

[119] *fn37 The State's proposed Instruction 5 reads in pertinent part: There was a building code in effect for the City of Ketchikan and State of Alaska in 1982/1983 when the Ketchikan Correctional Center was constructed. It provides: 1979 Uniform Building Code § 3303 (i). (i) Change in Floor Level at Doors. . . . Where doors open over landings, the landing shall have a length of not less than 5 feet. If you decide it is more likely true than not true that the State of Alaska violated any part of this law, you may consider that fact along with all other evidence [including any evidence tending to show why the law was violated] in deciding whether under the circumstances of this case the defendant used reasonable care. (Brackets in original.) The State's proposed Instruction 6 reads in pertinent part: There was a building code in effect for the City of Ketchikan and State of Alaska in 1994 that applies to this case. It provides: 1991 Uniform Building Code § 3304 (j) (j) Landings at Doors. . . . Landings shall have a length measured in the direction of travel of not less then 44 inches. If you decide it is more likely true than not true that the State of Alaska obeyed this law, you may still decide the State of Alaska is negligent if you decide that a reasonably careful person under circumstances similar to those shown by the evidence would have taken precautions in addition to those required by the uniform building code.

[120] *fn38 The legislature enacted AS 09.17.010 as part of the 1986 tort reform. See Ch. 139, § 1, SLA 1986. The legislature has subsequently modified the statute, but that modification is inapplicable here because it only applies to injuries occurring after August 7, 1997. See Ch. 26, § 1, SLA 1997.

[121] *fn39 AS 09.17.010 (1996).

[122] *fn40 See, e.g., Owens-Corning v. Walatka, 725 A.2d 579, 585 (Md. Spec. App. 1999); Lewis v. Krogol, 582 N.W.2d 524, 526 (Mich. App. 1998).

[123] *fn41 Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc., 963 P.2d 1055, 1062 (Alaska 1998) (quoting Ben Lomond, Inc. v. Schwartz, 915 P.2d 632, 635 (Alaska 1996)).

[124] *fn42 See School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 279-80 (1987) (approving of the definition of "physical impairment" in 45 C.F.R. § 84.3(j)(2)(i) (1985)).

[125] *fn43 Because we have concluded that the non-economic damages cap does not apply to

Johnson, we need not address Johnson's contention that the damages cap is unconstitutional. See Municipality of Anchorage v. Anchorage Daily News, 794 P.2d 584, 594 n.18 (Alaska 1990).

[126] *fn44 See Thomas Mauet, Fundamentals of Trial Techniques, 275, 277 (2d ed. 1988).

[127] *fn45 On cross-appeal Johnson challenges the superior court's failure to take judicial notice of OSHA regulations that he claims show that the jail violated federal safety standards. The superior court appropriately exercised its discretion when it refused to take judicial notice of the OSHA regulations. The OSHA regulations are "duly published regulations of agencies of the United States." Alaska R. Evid. 202(c)(2). Accordingly, the court's decision to take judicial notice is governed by Rule 202(c), which grants the trial court discretion as to whether to take judicial notice when an attorney does not make a proper request. Because Johnson's counsel made no prior request, the trial court was free to take or refuse to take judicial notice.

20000505

ANNOTATION

RIGHT OF PARTY TO HAVE ATTORNEY OR PHYSICIAN PRESENT DURING PHYSICAL OR MENTAL EXAMINATION AT INSTANCE OF OPPOSING PARTY

by

Thomas M. Fleming, J.D.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

23 Am Jur 2d, Depositions and Discovery § 305

Annotations: See the related matters listed in the annotation.

10A Federal Procedure, L Ed, Discovery and Depositions §§ 26:446, 26:447

8 Federal Procedural Forms, L Ed, Discovery and Depositions §§ 23:351-23:388

8 Am Jur Pl & Pr Forms (Rev), Depositions and Discovery, Forms 601-668; 11A Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 1341-1368

1 Am Jur Trials 357, Investigating the Civil Case, General Principles § 86; 4 Am Jur Trials 615, The Impaired Driver—Ascertaining Physical Condition §§ 2, 26-30; 6 Am Jur Trials 423, Collateral Cross-Examination of Medical Witness § 18; 15 Am Jur Trials 373, Discovery and Evaluation of Medical Records § 11

US L Ed Digest, Depositions and Discovery § 43

ALR Digests, Discovery and Inspection §§ 19, 23.5

Index to Annotations, Absence or Presence; Attorney or Assistance of Attorney; Civil Procedure Rules; Discovery; Physical and Mental Examinations; Physicians and Surgeons

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

Right of party to have attorney or physician present during physical or mental examination at instance of opposing party

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I. Preliminary Matters

§ 1. Introduction

[a] Scope

This annotation[1] collects and analyzes those cases in which the courts have considered whether, or under what circumstances, a party to a civil action,[2] subjected to a physical or mental examination at the instance of an opposing party[3] and conducted by a medical expert[4] of the opponent's choice,[5] is entitled or permitted to have his or her own attorney[6] or medical expert present during the examination.

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments bearing upon this subject. Since these are discussed herein only to the extent that they are reflected in the reported cases within the scope of this annotation, the reader is advised to consult the appropriate statutory or regulatory compilations.

1. This annotation supersedes the one at 64 ALR2d 497.

2. The scope of this annotation is limited primarily to actions seeking the recovery of general damages for physical or mental injury. Other types of cases, such as those involving workers' compensation, domestic relations, or estates, have been included herein only where the annotated issue has been considered and determined pursuant to statutes or rules expressly recognized by the court as applicable to civil actions generally.

3. This annotation includes cases in which the party was compelled to submit to the examination by court order following a motion by the opponent, and cases in which the party submitted to the examination at the defendant's request, without a court order.

4. This includes medical doctors, psychiatrists, psychologists, and any other experts generally deemed qualified to conduct a physical or mental examination of the person for discovery purposes.

5. This includes cases in which the examining expert was independently designated by the opponent, and cases in which the expert was formally appointed by the court based on the opponent's express nomination. Cases involving examination by a neutral expert appointed by the court, without a suggestion or request by a party that that particular person be appointed, are beyond the scope of this annotation. For a collection of cases considering a party's right to have his attorney or physician, or a court reporter, present during his physical or mental examination by a court-appointed expert, see the annotation at 7 ALR3d 881.

6. Cases involving attendance by a legal representative designated by the attorney, such as a law clerk, are included herein.

[b] Related matters

Discovery: right to ex parte interview with injured party's treating physician. 50 ALR4th 714.

Right of accused in criminal prosecution to presence of counsel at court-appointed or -approved psychiatric examination. 3 ALR4th 910.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child. 99 ALR3d 268.

Right of defendant in personal injury action to designate physician to conduct medical examination of plaintiff. 33 ALR3d 1012.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege. 25 ALR3d 1401.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings. 21 ALR3d 912.

Timeliness of application for compulsory physical examination of injured party in personal injury action. 9 ALR3d 1146.

Right of party to have his attorney or physician, or a court reporter, present during his physical or mental examination by a court-appointed expert. 7 ALR3d 881.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident. 89 ALR2d 1001.

Court's power to order physical examination of personal injury plaintiff as affected by distance or location of place of examination. 71 ALR2d 973.

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Federal Rule of Civil Procedure 35(b)(1, 2) and similar state statutes and rules pertaining to reports of physician's examination, 36 ALR2d 946.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition. 32 ALR2d 434.

Requiring submission to physical examination or test as violation of constitutional rights. 25 ALR2d 1407.

Right of federal indigent criminal defendant to obtain independent psychiatric examination pursuant to subsection (e) of Criminal Justice Act of 1964, as amended (18 USCS § 3006A(e)). 40 ALR Fed 707.

Constitutionality and construction of Federal Civil Procedure Rule 35 and Admiralty Rule 32A, concerning physical and mental examination of persons. 13 L Ed 2d 992.

§ 2. Background, summary, and comment

[a] Generally

Under Rule 35(a) of the Federal Rules of Civil Procedure, as well as

analogous state rules and statutes,[7] a party whose physical or mental condition is in controversy may be ordered by the court to submit to a physical or mental examination by a physician, on motion and for good cause shown, upon notice to all parties specifying the time, place, manner, conditions, and scope of the examination, and the person or persons by whom the examination is to be made.[8] The procedure's purpose is to inform the parties and court regarding the examinee's true condition, and thereby to secure the just, speedy, and inexpensive determination of the action.[9]

Because such an examinations is usually conducted by a physician of the movant's choice, subject to the court's discretion,[10] its objectivity and nonpartisan character is sometimes questioned. This is particularly true in personal injury litigation, where certain medical experts are often perceived as regularly aligned with the defense or the plaintiff's cause. People are also frequently anxious about exposing their bodies or minds to examination by a stranger, especially one associated with a hostile party. Accordingly, the examinee may seek to have his or her attorney or personal physician present during the procedure, for purposes of protection, advice, or comfort. The courts have taken divergent positions as to whether, and under what circumstances, this should be permitted.[11]

A physical examination, while primarily involving external observation, testing, or manipulation of the body, often requires some inquiry by the physician into the examinee's medical history and the events giving rise to the injury. It is this fact which most concerns lawyers about uncounseled examinations of their clients by doctors acting for an opponent. Generally reasoning that counsel's presence may protect the examinee from improper questioning by the doctor on matters pertinent only to liability, or that it may lend the examinee emotional comfort and support, many courts have recognized that a civil litigant physically examined by an opponent's doctor ordinarily may have his or her attorney present during the examination (§ 3). Some of these courts allow the trial judge discretion to require an examination without counsel, if the opponent affirmatively establishes a need for such exclusion (§ 4), while one court has balanced the examinee's and the examining doctor's interests by entitling the former to counsel's presence only during the taking of a medical history or questioning about how the injury occurred

7. For a list of states having rules based on, or substantially similar to, the Federal Rules of Civil Procedure, see Am Jur 2d, Deskbook, Item No. 126.

8. 23 Am Jur 2d, Depositions and Discovery § 282; 10A Federal Procedure, L Ed § 26:425.

9. 23 Am Jur 2d, Depositions and Discovery § 282; 10A Federal Procedure, L Ed § 26:425.

10. 23 Am Jur 2d, Depositions and Discovery § 302; 10A Federal Procedure, L Ed § 26:440.

11. 23 Am Jur 2d, Depositions and Discovery § 305; 10A Federal Procedure, L Ed §§ 26:446, 26:447.

(§ 5). Other courts, reasoning that counsel's attendance at an adverse physical examination is ordinarily unnecessary or undesirable, hold that the examinee generally has no right to an attorney's presence during the procedure (§ 6), unless, as some of these courts recognize, the examinee affirmatively establishes a need for counsel's attendance (§ 7). Finally, several courts, without clearly taking a position generally approving or disfavoring counsel's presence at an adverse physical examination, have held that it is within the trial judge's sound discretion whether to require such examination without attendance by the examinee's attorney (§ 8).

Under particular circumstances in two cases, the courts affirmed orders that a litigant be physically examined by the opponent's doctor without the presence of counsel, because the examinee failed to establish alleged bias or improper conduct on the doctor's part (§ 9[a]). However, two other courts held improper orders that a litigant submit to an adverse physical examination without a lawyer or legal representative in attendance, absent sufficient proof that the attorney or representative would interfere with the examination or had previously attempted to do so (§ 9[b]).

The courts have divided on the effect of attendance at an adverse physical examination by a third person other than the examinee's lawyer. Thus, one court held that a plaintiff was entitled to her lawyer's presence during her examination by defense doctors, notwithstanding the defendant's proposal that a court reporter attend in lieu of counsel, while another court upheld the denial of a plaintiff's request for counsel during her examination by the defendant's physician, finding that the trial judge adequately protected her interests by allowing her husband to attend (§ 10).

Litigants physically examined by an opponent's doctor have also sought, on occasion, to have their own physician present during the examination. A number of courts have recognized that an examinee ordinarily may have his or her personal physician attend (§ 11), although one of these courts allows the trial judge discretion to order an examination without the presence of another doctor, if the examining party affirmatively shows a need for the procedure to be so conducted (§ 12). Several other courts, without taking a clear position generally approving or disapproving attendance by the examinee's physician, have recognized that the trial judge may permit it in "special circumstances" (§ 13). Still another court, however, has held that a personal injury plaintiff has no unqualified right to the presence of his or her own doctor during an adverse physical examination, because attendance by an attorney or court reporter adequately protects the plaintiff's interests (§ 14).

Considering attendance by the examinee's physician in light of particular circumstances, one court has said that a female litigant's objection to physical examination by an unfamiliar doctor acting for the opponent might justify a requirement that the examination be conducted in her own physician's presence; but another court held

that the trial judge in a malpractice action alleging negligent radical hemorrhoidectomy did not abuse his discretion by requiring the female plaintiff to undergo a physical examination of her anal sphincter muscle by the defendants' medical expert, without the presence of her own physicians, because the plaintiff was a registered nurse and did not claim that she needed her doctor to protect her privacy or shield her from embarrassment (§ 15). The court in the latter case also upheld the judge's examination order because the plaintiff's own physician examined her a few hours after the adverse examination, and three other doctors who examined the plaintiff testified in her behalf (§ 16).

Special problems may arise in connection with the presence of third persons at a mental examination, which requires sensitive communication and intensive questioning of the examinee concerning his or her past, subjective feelings, and other matters of significance perhaps not readily discernable by the untrained or casual observer. Generally reasoning that a third person's presence during a mental examination necessarily interferes with the close communication between examinee and physician necessary to the procedure's effectiveness, a number of courts take the position that a civil litigant subjected to a mental examination by an opponent's doctor generally has no right to the presence of his or her attorney during the procedure (§ 18), although some have held that the trial judge may permit the lawyer to attend, if the examinee affirmatively shows good cause for counsel's presence (§ 19). Other courts, however, adhere to the view that the examinee ordinarily may have his or her attorney present during the examination, except, as some have recognized, where the attorney interferes with the examination or the opponent shows a need to conduct the examination without counsel (§ 17). The Ohio courts have taken divergent positions. Thus, one has ruled that except in that portion of the examination seeking information on how the injury occurred and the nature of the damage at that time, an attorney may be excluded from his client's adverse mental examination if the opponent's doctor reasonably objects to his presence (§ 20). In two more recent Ohio cases, however, the courts held that a litigant subjected to a psychiatric examination by an opponent's doctor is entitled to the presence of counsel (§ 20).

A litigant's emotional state at the time of his or her adverse mental examination may be significant in determining the propriety of counsel's attendance during the procedure. Thus, while one court held that a plaintiff claiming emotional injury did not have a right to counsel during her examination by a defense psychiatrist, although she disliked and feared the doctor and her own psychiatrist stated that it might be dangerous for her to be examined without her lawyer's support, another court found it proper for a plaintiff's attorney to attend his client's adverse psychiatric examination, because the plaintiff was tense, anxious, and near tears at the time of the interview (§ 21).

The possibility of inquiry into private sexual matters during an adverse mental examination has been advanced in some cases as a reason to permit attendance by the examinee's lawyer. Where emotional injury due to sexual harassment at work was alleged, one court ruled that the plaintiff was not entitled to counsel at her mental examination by the defendant's physician, merely because the doctor might improperly inquire into her sexual history; but another court considering such a claim reached the opposite conclusion, without directly discussing the anticipated scope of the doctor's inquiry, finding that attendance by a third person was necessary to assure that the doctor did not probe beyond "permissible limits" (§ 22[a]). In cases involving emotional injury from other kinds of sexual abuse or assault, courts have ruled that the female plaintiff was not entitled to the presence of her attorney during a mental examination by the defendant's psychiatrist, despite claims of possible further trauma due to extensive questioning by a male physician (§ 22[b]), and because of the sensitivity of expected inquiry into a sexually perverted assault on the plaintiff (§ 22[c]).

As with physical examinations, some civil litigants mentally examined by an opponent's physician have sought to have their own doctor present during the examination. The few courts considering the propriety of such a request have held that litigants generally, or particular parties, are or were permitted to have a doctor or other health care practitioner of their choice present during a mental examination by an opponent's designated physician, subject to limitations on the accompanying expert's conduct during the examination or at trial (§ 23).

[b] Practice pointers

Statutes or rules in particular jurisdictions may accord a litigant the right, or at least the opportunity, to have his or her attorney or physician present during a medical examination by an opponent's doctor.[12]

In jurisdictions where counsel's attendance at the examination is not a matter of right, the examinee's attorney may support a claim that his presence is necessary by presenting evidence of hostility between his client and the proposed examining physician, or reluctance, fear, or extreme emotional distress on the client's part.[13] The attorney may also attempt to show that his client's character, personality, or sophistication are such that counsel's presence would strengthen his confidence and facilitate communication with the physician, so as to improve the chances for an accu-

12. See, for example, McDaniel v Toledo, P. & W. R. Co. (1983, CD Ill) 97 FRD 525, 36 FR Serv 2d 101 (citing Illinois statute); Vinson v Superior Court (1987) 43 Cal 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301 (statute); Nemes v Smith (1971) 37 Mich App 124, 194 NW2d 440 (rule).

13. See, for example, Whanger v American Family Mut. Ins. Co. (1973) 58 Wis 2d 461, 207 NW2d 74; Karl v Employers Ins. of Wausau (1977) 78 Wis 2d 284, 254 NW2d 255.

rate examination.[14] If the proposed physician would not object to counsel's attendance at the examination, the attorney should consider presenting an affidavit from him to that effect.[15] The ease or difficulty of finding a physician who will perform the examination in the presence of a third person, as well as the customs and practices of the local bar and medical community, may also be relevant.[16]

Where the proposed examining physician objects to having the examinee's attorney present during the procedure, on grounds such as the unlikelihood of obtaining candid and complete responses from the examinee with a third person present, counsel for the examining party should consider presenting the physician's affidavit to such effect.[17] The availability of other protective measures may be stressed, such as the examinee's entitlement to a written report of the examination; the opportunity to depose, cross-examine, and contradict the examining physician with the assistance of a favorable medical expert; the right to seek exclusion of statements to the physician by the examinee in response to questions beyond a scope necessary to develop a sensible medical history; and the possibility of having the examination conducted by a different physician, if the court is unsure of the proposed examiner's competence, integrity, or impartiality.[18] Counsel for the examining party may also show the lack of need for counsel's presence by citing to any written medical ethics standards in the jurisdiction restricting the scope of a doctor's permissible questioning into the details of a legally disputed accident.[19] In addition, local standards of attorney conduct discouraging the presence of lawyers at adverse medical examinations may be emphasized.[20]

If the examinee's attorney is not allowed to attend the entire examination, he may still ask for permission to be present while the physician takes a medical history from the client or questions him about details concerning the accident at

14. See, for example, Whanger v American Family Mut. Ins. Co. (1973) 58 **Wis** 2d 461, 207 NW2d 74.

15. See, for example, Karl v Employers Ins. of Wausau (1977) 78 **Wis** 2d 284, 254 NW2d 255.

16. See, for example, Bartell v McCarrick (1986, **Fla** App D4) 498 So 2d 1378, 12 FLW 79.

17. See, for example, Pedro v Glenn (1968) 8 **Ariz** App 332, 446 P2d 31.

18. See, for example, Edwards v Superior Court of Santa Clara County (1976) 16 **Cal** 3d 905, 130 Cal Rptr 14, 549 P2d 846; Wood v Chicago, M., S. P. & P. R. Co. (1984, **Minn** App) 353 NW2d 195.

19. See, for example, Wood v Chicago, M., S. P. & P. R. Co. (1984, **Minn** App) 353 NW2d 195.

20. See, for example, Wood v Chicago, M., S. P. & P. R. Co. (1984, **Minn** App) 353 NW2d 195 (interprofessional relations code providing that it was not desirable for a lawyer to be present when his client is being examined by a physician, whether employed on behalf of the client or an adverse party, but permitting discussion between the lawyer and the physician as to any pertinent aspect of the examination).

issue.[21] Another alternative, allowed in some jurisdictions, is to have the examination recorded mechanically or by a stenographer.[22] Counsel may also request that the examinee's own physician be permitted to attend.[23] If such a request is granted, the opposing party may ask that the role of the examinee's doctor be limited to observation, and that he be ordered to refrain from objecting or interrupting.[24] The opponent may also move that the examinee's physician not be permitted to testify in the examinee's case in chief about the procedures and methods used by the opponent's doctor during the examination.[25]

Where a party refuses to comply with a proper order that he submit to an examination by the opponent's physician without the presence of his lawyer, the opponent may ask the court to dismiss the complaint with prejudice.[26]

II. Physical Examination

A. Presence of Examinee's Attorney

1. General Rules

§ 3. View that examinee ordinarily may have attorney present

Generally reasoning that counsel's presence at an adverse medical examination may protect the examinee from improper questioning by the doctor on matters pertinent only to legal liability, or otherwise lend the examinee comfort and support, the courts in the following cases held or recognized that a civil litigant, subjected to a physical examination at an opponent's instance to be conducted by a doctor the opponent has designated, ordinarily may have his or her attorney present during the examination.

Alaska—Langfeldt-Haaland v Sa-

21. See, for example, Mohr v District Court of Fourth Judicial Dist. (1983) 202 **Mont** 423, 660 P2d 88.

22. See, for example, Di Bari v Incaica Cia Armadora, S.A. (1989, ED NY) 126 FRD 12, 14 FR Serv 3d 1362; Langfeldt-Haaland v Saupe Enterprises, Inc. (1989, **Alaska**) 768 P2d 1144, 84 ALR4th 547; Gonzi v Superior Court of San Francisco (1959) 51 **Cal** 2d 586, 335 P2d 97; Rochen v Huang (1988, **Del** Super) 558 A2d 1108; Bartell v McCarrick (1986, **Fla** App D4) 498 So 2d 1378, 12 FLW 79; Barraza v 55 West 47th Street Co. (1989, 1st Dept) 156 App Div 2d 271, 548 NYS2d 660.

23. See, for example, Dziwanoski v Ocean Carriers Corp. (1960, DC Md) 26 FRD 595, 4 FR Serv 2d 640 (if examinee informs doctor and attorney for other side); Bartell v McCarrick (1986, **Fla** App D4) 498 So 2d 1378, 12 FLW 79; Gray v Victory Memorial Hosp. (1989) 142 Misc 2d 302, 536 NYS2d 679 (mental examination).

But see Long v Hauser (1975, 4th Dist) 52 **Cal** App 3d 490, 125 Cal Rptr 125, in which the court held that a personal injury plaintiff has no unqualified right to the presence of his or her own physician during a physical examination by the defendant's chosen doctor, in addition to an attorney or a court reporter.

24. See, for example, Rochen v Huang (1988, **Del** Super) 558 A2d 1108.

25. See, for example, Gray v Victory Memorial Hosp. (1989) 142 Misc 2d 302, 536 NYS2d 679.

26. See, for example, Jensen v Wallace (1984, **Mo** App) 671 SW2d 331.

upe Enterprises, Inc. (1989, Alaska) 768 P2d 1144, 84 ALR4th 547.

Cal—Sharff v Superior Court of San Francisco (1955) 44 Cal 2d 508, 282 P2d 896, 64 ALR2d 494; Gonzi v Superior Court of San Francisco (1959) 51 Cal 2d 586, 335 P2d 97; Edwards v Superior Court of Santa Clara County (1976) 16 Cal 3d 905, 130 Cal Rptr 14, 549 P2d 846; Vinson v Superior Court (1987) 43 Cal 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301 (statute).

Jorgensen v Superior Court of Sonoma County (1958, 3rd Dist) 163 Cal App 2d 513, 329 P2d 550; Durst v Superior Court of Los Angeles County (1963, 2nd Dist) 222 Cal App 2d 447, 35 Cal Rptr 143, 7 ALR3d 874; Whitfield v Superior Court of Los Angeles County (1966, 2nd Dist) 246 Cal App 2d 81, 54 Cal Rptr 505; Munoz v Superior Court of Santa Clara County (1972, 1st Dist) 26 Cal App 3d 643, 102 Cal Rptr 686; Long v Hauser (1975, 4th Dist) 52 Cal App 3d 490, 125 Cal Rptr 125.

Fla—Bartell v McCarrick (1986, Fla App D4) 498 So 2d 1378, 12 FLW 79; High v Burrell (1987, Fla App D5) 509 So 2d 385, 12 FLW 1620; Stakley v Allstate Ins. Co. (1989, Fla App D2) 547 So 2d 275, 14 FLW 1860.

Ill—Eskandani v Phillips (1975) 61 Ill 2d 183, 334 NE2d 146 (statute expressly providing).

Mich—Zawacki v Detroit Harvester Co. (1945) 310 Mich 415, 17 NW2d 234 (statute expressly providing); Feld v Robert & Charles Beauty Salon (1990) 435 Mich 352 (statute expressly providing).

Nemes v Smith (1971) 37 Mich App 124, 194 NW2d 440 (rule expressly providing).[27]

NY—Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612; Ponce v Health Ins. Plan (1984, 2d Dept) 100 App Div 2d 963, 475 NYS2d 102; Lamendola v Slocum (1989, 3d Dept) 148 App Div 2d 781, 538 NYS2d 116; Mertz v Bradford (1989, 4th Dept) 152 App Div 2d 962, 543 NYS2d 786.

Reardon v Port Authority of New York & New Jersey (1986) 132 Misc 2d 212, 503 NYS2d 233; Mosel v Brookhaven Memorial Hospital (1986) 134 Misc 2d 73, 509 NYS2d 754; Gray v Victory Memorial Hosp. (1989) 142 Misc 2d 302, 536 NYS2d 679.

For Ohio cases, see § 8.

Pa—Hess v Lakeshore & M.S.R. Co. (1890) 7 Pa Co 565 (order issued, apparently without dispute, specifying that examination be conducted in presence of counsel for both parties).

Wash—Tietjen v Department of Labor & Industries (1975) 13 Wash App 86, 534 P2d 151.

27. In Feld v Robert & Charles Beauty Salon (1989) 174 Mich App 309, 435 NW2d 474, app gr, in part 433 Mich 879, 446 NW2d 169 and revd on other grounds 435 Mich 352, a later workers' compensation case, the court referred to the general discovery rule cited in Nemes as "then applicable," but did not mention any new or amended rule. Accordingly, the reader is advised to consult the latest compilation of Michigan civil procedure rules to verify the current status of the one applied in Nemes.

In Langfeldt-Haaland v Saupe Enterprises, Inc. (1989, **Alaska**) 768 P2d 1144, 84 ALR4th 547, the court held that a party to a civil action is generally entitled to have his or her attorney present during a physical examination conducted at an opponent's instance by its physician, subject to the trial judge's authority to enter appropriate protective orders. The court reasoned that such examinations are often critical in the litigation process, and that parties are generally entitled to the protection and advice of counsel when they enter the legal arena. The court found support for its position by analogizing to case law recognizing a criminal defendant's right to his attorney's presence at a court-ordered psychiatric examination requested by the prosecution, and noted the existence of a constitutional right to counsel in civil cases arising from the due process clause of the state constitution. The court also reasoned that counsel may observe shortcomings and improprieties in an examination which can be brought out during cross-examination. While observation may be the primary role of counsel attending an examination, the court explained, the attorney may on occasion properly object to questions concerning privileged information.[28]

Likewise, the court in Sharff v Superior Court of San Francisco (1955) 44 **Cal** 2d 508, 282 P2d 896, 64 ALR2d 494, held that a personal injury plaintiff subjected to a court-ordered physical examination by the defendant's chosen physician is generally permitted to have the assistance and protection of an attorney during the examination. The court reasoned that a lay person should not be expected to evaluate at his peril the propriety of all questions that may be asked while he is being examined by a doctor the defendant has selected. The court acknowledged the possibility that an attorney could hinder an examination by making groundless objections, thereby depriving the defendant of the benefit of an informed medical opinion, but commented that the plaintiff should not be left unprotected on the assumption that an attorney would unduly interfere with the examination. Should such interference occur, the court stated, the trial judge may take appropriate steps to provide the doctor with a reasonable opportunity to complete his investigation of the nature and extent of any injuries the plaintiff may have sustained.

Commenting that in a required physical examination of a personal injury plaintiff by the defendant's chosen physician, attendance by the plaintiff's attorney may be as important as his presence at an oral deposition, the court in Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612, held that absent a compelling showing of need for the examination to be conducted without counsel, the plaintiff is entitled to have his or her lawyer present during

28. The court also commented that if the client does not wish his or her attorney to attend all or part of an examination, such wish must govern.

the examination. The court observed that a physician selected by the defendant to examine the plaintiff is not necessarily an impartial medical expert, indifferent to the parties' conflicting interests. The possible adversary status of the examining doctor, the court declared, is ordinarily a compelling reason to permit attendance by the plaintiff's counsel in order to prevent, for example, improper questioning on liability issues. This is not to suggest, the court explained, that counsel may interfere with the conduct of the physical examination, or that the examining room should be turned into a hearing room with lawyers and stenographers from both sides participating. The lawyer's role at the physical examination, the court said, should be limited to protecting the client's legal interests, apart from the actual physical examination. The court further explained that in order to perform his function, the examining physician should be allowed to ask such questions as, in his opinion, are necessary to enable him to determine the nature and extent of the alleged injuries, which may include inquiry into the particular manner in which the injuries were received. The court concluded that if the attorney's participation intrudes upon the examination, the trial judge may take appropriate steps, in light of the facts and circumstances of the case, to provide the doctor with a reasonable opportunity to complete his examination.[29]

§ 4. —But court may bar attorney if opponent establishes need for exclusion

In the following cases, the courts held or recognized that although a civil litigant physically examined by an opponent's designated physician may generally have counsel present during the examination, the trial judge has discretion to order that the examination be conducted without an attorney present, if the opponent sustains the burden of establishing a need to exclude counsel.

Fla—Bartell v McCarrick (1986, Fla App D4) 498 So 2d 1378, 12 FLW 79; High v Burrell (1987, Fla App D5) 509 So 2d 385, 12 FLW 1620; Stakley v Allstate Ins. Co. (1989, Fla App D2) 547 So 2d 275, 14 FLW 1860.

NY—Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612 (compelling showing required).

Reardon v Port Authority of New York & New Jersey (1986) 132 Misc 2d 212, 503 NYS2d 233 (same).

The court in Bartell v McCarrick (1986, **Fla** App D4) 498 So 2d 1378, 12 FLW 79, held that while a personal injury plaintiff subjected to a compulsory physical examination by the defendant's chosen

29. The reader's attention is directed to Lawrence v Samuels (1897) 20 Misc 15, 44 NYS 602, app dismd 20 Misc 278, 45 NYS 743, a case predating modern discovery rules, in which the court declared that an attorney for a female personal injury plaintiff has no right to be present at a court-ordered physical examination of his client, where the statute authorizing such examinations required that a female plaintiff be examined by a female physician.

physician is ordinarily entitled to have an attorney present during the examination, the trial judge may prohibit attendance by counsel, in his sound discretion, if the defendant sustains its burden of showing a valid reason why the examination should be conducted without counsel. The court observed that an examining physician selected by the defendant is not necessarily indifferent to the parties' conflicting interests, and that he might improperly question the plaintiff as to liability or other issues. However, the court explained, a variety of factors may militate against a hard-and-fast rule regarding attendance by counsel, such as language barriers, inability to engage a physician who will perform the examination in a third person's presence, the patient's particular physical or psychological needs, and the local customs and practices of the bar and medical profession. Accordingly, the court reasoned, trial judges are in the best position to decide the issue of attorney attendance on a case-by-case basis.[30]

§ 5. View that examinee is entitled to attorney's presence only during taking of medical or factual history

The court in the following case held that a personal injury plaintiff subjected to a physical examination by the defendant's designated physician is entitled to have an attorney present only while the doctor takes the plaintiff's medical history or questions him as to how the injury occurred.

In Mohr v District Court of Fourth Judicial Dist. (1983) 202 **Mont** 423, 660 P2d 88, the court held that a personal injury plaintiff physically examined by the defendant's designated physician is entitled to have his attorney present only during that portion of the examination when a medical history is taken from the plaintiff or he is questioned as to how the injury occurred. The court observed that in a number of jurisdictions one subjected to a compulsory examination is allowed to have the protection and assistance of counsel therein, on the theory that a doctor selected by one party to examine the other may ask improper questions which a lay person should not be expected to evaluate. In other jurisdictions, the court noted, the examinee is denied an unqualified right to an attorney's presence on grounds that the examination should be nonadversarial. The court commented that while an attorney might abuse his presence at a physical examination, most lawyers try to cooperate with doctors. Therefore, the court explained, a balance

30. Observing that in the instant case the defendant's designated physician refused to examine the plaintiff when she appeared at his office with a representative from her attorney's office, and that the trial judge thereafter ordered the plaintiff to submit to examination without the attendance of such a representative, the court remanded the case with a suggestion that the order be reconsidered, and that the judge determine whether it was imperative to have the examination performed by the originally designated physician, or whether other doctors were available who would perform it with counsel or other representative present.

may be struck between the litigant's right to counsel and the need for efficiency in the examination by allowing the examinee to have the advice and benefit of an attorney while the doctor is taking a medical history or gathering facts as to how the examinee was injured, while excluding the attorney from the actual physical examination. The court reasoned that counsel's presence during the actual examination is usually not necessary to insure its objectivity because, by nature, the examination is a nonadversarial procedure. The court observed that the trial judge can still remedy any abuses, such as by excluding from evidence any statements elicited from the examinee while the attorney is not present. The court further explained that if the attorney becomes disruptive during the history portion of the examination, the judge may take steps, including the imposition of sanctions, for failure to cooperate in the discovery process.

§ 6. View that examinee generally has no right to presence of attorney

Reasoning that counsel's presence during a physical examination of the client is ordinarily unnecessary or undesirable, the courts in the following cases held or recognized that a civil litigant, subjected to a physical examination at an opponent's instance by a physician the opponent has designated, generally has no right to the presence of his or her attorney during the examination.

US—Dziwanoski v Ocean Carriers Corp. (1960, DC Md) 26 FRD 595, 4 FR Serv 2d 640; Warrick v Brode (1969, DC Del) 46 FRD 427, 13 FR Serv 2d 992; Neumerski v Califano (1981, ED Pa) 513 F Supp 1011; McDaniel v Toledo, P. & W. R. Co. (1983, CD Ill) 97 FRD 525, 36 FR Serv 2d 101; Wheat v Biesecker (1989, ND Ind) 125 FRD 479.

For Louisiana cases, see § 8.

Minn—Wood v Chicago, M., S. P. & P. R. Co. (1984, Minn App) 353 NW2d 195.

Mo—Jensen v Wallace (1984, Mo App) 671 SW2d 331.

Wis—Whanger v American Family Mut. Ins. Co. (1973) 58 Wis 2d 461, 207 NW2d 74; Karl v Employers Ins. of Wausau (1977) 78 Wis 2d 284, 254 NW2d 255.

An attorney may not be present when his client is physically examined by an opponent's designated physician under Rule 35 of the Federal Rules of Civil Procedure, if the examining party objects, ruled the court in Warrick v Brode (1969, DC Del) 46 FRD 427, 13 FR Serv 2d 992. The court reasoned that such an examination should be divested as far as possible of any adversary character, and that the examining doctor is effectively an officer of the court performing a nonadversary duty. The very presence of an attorney for the examinee, the court commented, injects a partisan character into what should be a wholly objective inquiry. The court observed that if an attending lawyer tried to control the examination, he would be invading the physician's province, and that if he wanted his observations to be the basis for possible contradiction of the doctor, he would be making himself a

witness, contrary to standards of professional ethics. The court pointed out that the absence of counsel does not leave the examinee unprotected, since he may have his own physician present if his wish therefor is communicated to the doctor and the opponent's attorney. Moreover, the court noted, the examinee's attorney may challenge the evidentiary use of information obtained during the examination, and may inspect the report he is entitled to demand under Rule 35. If the trial judge finds that the designated physician cannot be trusted to make a fair examination, the court observed, he may deny an examination or designate another doctor in whom he has confidence. Such measures, the court concluded, adequately safeguard the parties in the ordinary case and equalize their opportunity to discover the true nature and extent of the injuries claimed.

In Wood v Chicago, M., S. P. & P. R. Co. (1984, **Minn** App) 353 NW2d 195, the court held that a personal injury plaintiff has no general right to his attorney's presence during a physical examination by the defendant's chosen physician, although the final decision whether to allow attendance by counsel rests in the trial judge's sound discretion. The court observed that in practice defense counsel favor certain physicians for adverse examinations, and that plaintiffs have similarly identified their favorites, thereby casting physicians in the role of advocates, a result unintended by the civil procedure rules and undesirable from the standpoint of medical ethics. To routinely permit the presence of lawyers during adverse medical examinations, the court reasoned, would thrust the adversary process into the examining room, where the most competent and honorable physicians would be the most sensitive to intrusion, and more partisan doctors might feel challenged to outwit the attorney. The court also observed that remedies already exist for any abuse of the procedure. For example, the court explained, the trial judge may refuse to order a requested examination, or decide that the physician selected by the defendant should not perform the examination. The court also noted that in exceptional cases the judge may allow the plaintiff to tape record the examination, or to have a court reporter or his own doctor present. Furthermore, the court observed, the plaintiff's attorney has the right to a detailed report from the examining physician, and may depose the doctor, cross-examine him, or introduce contrary expert evidence. The court also noted that according to the state's code of interprofessional relations, a doctor taking a medical history for a party adverse to the examinee should not attempt to elicit admissions regarding the accident in issue, and a lawyer ordinarily should not be present when his client is being examined by a physician, whether employed on his own or an adverse party's behalf, although he may discuss with the doctor any aspect of the examination that may be pertinent. The court concluded that exercise of the trial judge's sound discretion, in light of these alternatives, provided the most appropriate safeguard against abuse of the examination procedure.

The court in Jensen v Wallace

(1984, **Mo** App) 671 SW2d 331, held that a personal injury plaintiff is not entitled to have his attorney attend a court-ordered physical examination by the defendant's physician, and that the trial judge may order that the examination be conducted in the absence of counsel. The court explained that while a party does have a constitutional right to be represented by retained counsel at all stages of litigation, the denial of a party's request to be represented by counsel at a particular stage of the proceeding is a violation of due process only if the particular stage is one of "litigation," and the refusal is arbitrary. The court commented that a judge's refusal to allow a plaintiff's attorney to accompany him at a physical examination substantially differs from a refusal to allow the party's attorney to enter an appearance on his behalf, because the former does not deny the plaintiff his right to be heard. The court further stated that a medical examination is not per se an adversary proceeding, or a stage of litigation presumptively requiring the presence of a party's attorney. The court concluded that the presence of a lawyer for one side would inject a partisan note into what should be a wholly objective inquiry.

§ 7. —But court may admit attorney if examinee establishes need for counsel

The courts in the following cases held or recognized that while a civil litigant physically examined by an opponent's designated physician generally has no right to the presence of his or her attorney during the examination, the trial judge has discretion to permit the lawyer to attend, if the examinee sustains the burden of establishing a need for counsel's presence.

US—Dziwanoski v Ocean Carriers Corp. (1960, DC Md) 26 FRD 595, 4 FR Serv 2d 640; Wheat v Biesecker (1989, ND Ind) 125 FRD 479.

For Louisiana cases, see § 8.

Minn—Wood v Chicago, M., S. P. & P. R. Co. (1984, Minn App) 353 NW2d 195.

Wis—Whanger v American Family Mut. Ins. Co. (1973) 58 Wis 2d 461, 207 NW2d 74; Karl v Employers Ins. of Wausau (1977) 78 Wis 2d 284, 254 NW2d 255.

In Whanger v American Family Mut. Ins. Co. (1973) 58 **Wis** 2d 461, 207 NW2d 74, the court held that when the defendant in a personal injury action seeks a physical examination of the plaintiff by a physician it has nominated, the trial judge has discretion to permit the plaintiff's attorney to attend the examination, with the burden resting on the plaintiff to show a need for counsel's presence or prejudice if the attorney is not allowed to attend. The court pointed out that in the language of the applicable statute, the judge "may" order such an examination, "upon such terms as may be just." The court observed that while medical examinations are not adversary proceedings per se, and counsel's presence ordinarily adds nothing to their adequacy, a particular plaintiff's personality or sophistication may be such that counsel could give him assurance and assist in communicating, thereby aiding the

physician and facilitating a more accurate examination. Also, the court noted, there may be instances of hostility between the physician and the plaintiff, or reluctance or fear on the latter's part. The court declared that in these and other situations, where the plaintiff establishes a need for assistance by an attorney, counsel should be permitted to attend the examination upon such terms as are just.

§ 8. View that attorney's presence during examination is a matter within court's discretion

The courts in the following cases, without clearly taking a position generally approving or disapproving of counsel's presence at the physical examination of a personal injury plaintiff by the defendant's chosen physician, held that it is within the trial judge's sound discretion whether the plaintiff should be compelled to submit to such an examination without attendance by his attorney.

The court in Robin v Associated Indem. Co. (1973, **La**) 297 So 2d 427, without clearly expressing a view generally approving or disapproving of the presence of counsel at an adverse medical examination, apparently took the position that whether a personal injury plaintiff's lawyer should be allowed to attend a physical examination of his client, conducted at the defendant's instance by a physician of its choice, is a matter for the trial judge's discretion. If the examining physician is selected by defense counsel, the court noted, there is more reason to anticipate partiality than if the physician is court-appointed. The court also observed that discovery devices, though minimizing surprise in litigation, have not completely removed the partisan nature of a trial. The court acknowledged that there may be occasions when the presence of an attorney could prevent an efficient examination, or, as in the case of a psychiatric interview, so inhibit the examination as to destroy its utility. The court commented, however, that while a lawyer's attendance at the examination may ordinarily be of little help in determining the true facts regarding an injured litigant's condition, it is difficult to find good reason to prohibit the plaintiff from having the reassuring presence of his attorney. Certainly, the court reasoned, an attorney's presence would tend to limit such abuses as improper questioning by the examining physician concerning liability matters. For these reasons, the court explained, it should not and would not hold that an injured litigant is not entitled to have his lawyer present during an adverse physical examination.[31] The court con-

31. The court cited for comparison, without comment or express criticism, the case of Simon v Castille (1965, **La** App 3d Cir) 174 So 2d 660, application den 247 La 1088, 176 So 2d 145 and cert den 382 US 932, 15 L Ed 2d 344, 86 S Ct 325, in which the court took an apparently more restrictive position that a personal injury plaintiff does not have an absolute right to the presence of an attorney during an adverse physical examination, that the lawyer's attendance is a matter of discretion with the trial judge, and that the plaintiff bears the burden to show special circumstances requiring an attorney's presence during the examination. See also Lindsey v Escude (1965,

cluded that under the circumstances of the instant case, the trial judge did not abuse his discretion in denying the personal injury plaintiff's request to have her attorney present during such an examination.

Likewise, the court in Chaisson v Hartford Ins. Co. (1989, La App 3d Cir) 549 So 2d 1297, without specifying the particular circumstances of the case, held that the trial judge in a personal injury action did not abuse his discretion by permitting the plaintiff's attorney to attend a physical examination of his client by the defendant's medical expert.

Apparently overruling earlier authority that the plaintiff in a personal injury action is ordinarily entitled to the presence of counsel at his physical examination by a doctor of the defendant's choice,[32] the court in State ex rel. Lambdin v Brenton (1970) 21 **Ohio** St 2d 21, 50 Ohio Ops 2d 44, 254 NE2d 681, without itself taking a position generally approving or disapproving of counsel's presence at such examinations, stated that whether the plaintiff should be compelled to submit to an examination without attendance by his attorney is a matter within the trial judge's sound discretion. If the judge determines that counsel's presence would unduly impede the examining physician, the court explained, he has the power to order that the attorney be excluded.

Without clearly taking a position generally approving or disfavoring counsel's presence at adverse medical examinations, the court in Pemberton v Bennett (1963) 234 **Or** 285, 381 P2d 705, stated that whether a personal injury plaintiff's attorney may attend his client's physical examination by the defendant's designated physician is a matter within the trial judge's discretion. The court acknowledged that unlike an oral deposition, a medical examination does not typically require the assistance of counsel because the examining physician, while not always objective and although selected and compensated by the opponent, usually does not seek to establish facts favorable to the party who engaged him. The court also observed that an attorney's presence could prolong the examination or create an atmosphere making it difficult to determine the examinee's true reactions. As a result, the court commented, it might be harder to secure medical examinations by the most desireable physicians, who regard the procedure as an objective attempt to find the facts, regardless of the consequences to any party. On the other hand, the court pointed out, one who retains a lawyer to represent him in litigation ordinarily may have counsel present at all times for advice in any matter affecting the lawsuit. Moreover, the court explained, there are occasions when the trial judge might find reasonable a request for the presence of an attorney during all or part of an adverse physical examination, given the nature of the medical problem to be investigated, as well as of the examinee, the examiner, and the kind of examination proposed.

La App 3d Cir) 179 So 2d 505, involving the issue of prior notice to the plaintiff before issuance of an order that he submit to an adverse medical examination, in which the court, citing the Simon Case, observed that the plaintiff "may be able to assert" good cause why his attorney or some other person should be present at the examination.

32. See Kelley v Smith & Oby Co. (1954, CP) 70 **Ohio** L Abs 202, 129 NE2d 106; Francisco v Hoffman (1955, CP) 60 **Ohio** Ops 371, 74 Ohio L Abs 420, 131 NE2d 692; and Steele v True Temper Corp. (1961, CP) 16 **Ohio** Ops 2d 196, 86 Ohio L Abs 276, 174 NE2d 298, app dismd (App, Ashtabula Co) 31 Ohio Ops 2d 185, 91 Ohio L Abs 594, 193 NE2d 196. In S.S. Kresge Co. v Trester (1931) 123 **Ohio** St 383, 9 Ohio L Abs 349, 175 NE 611, the court affirmed, on other grounds and apparently without dispute on the issue, a trial judge's order providing in part that the personal injury plaintiff, required to submit to a physical examination by a physician whom the defendant suggested, would be permitted to have her counsel present at the examination. And in Carpenter v Dawson (1954, CP) 60 **Ohio** Ops 373, 74 Ohio L Abs 257, 138 NE2d 172, an unspecified type of civil action, the trial court, without clearly indicating whether the defendant sought to have the plaintiff physically examined by doctors of its own choosing, ruled that under the circumstances of the case, the defendant was entitled to have the plaintiff undergo a reasonable physical examination, with the right of the plaintiff to have his counsel present during the examination.

2. Under Particular Circumstances

§ 9. Bias or improper conduct

[a] Of examining physician

In the following civil cases, the courts affirmed orders by the trial judge that the plaintiff be physically examined by the defendant's designated physician without the presence of the plaintiff's attorney, because the plaintiff failed to establish alleged bias or improper conduct on the designated physician's part.

Finding the proof insufficient to establish that the physician designated by a personal injury defendant to physically examine the plaintiff was biased, hostile, or engaged in improper conduct prejudicial to the plaintiff, the court in Robin v Associated Indem. Co. (1973, La) 297 So 2d 427, held that the trial judge did not abuse his discretion in denying the plaintiff's request that her attorney be present during the examination. The plaintiff claimed that in the past, the doctor had limited examinees to "multiple choice" answers distorting their medical history and symptoms, that his procedures for recording examinations were irregular, that he was engaged in "forensic orthopedics," and that he was rude. The court, however, found no evidence that the physician had used multiple choice questions or answers, commenting that the doctor was entitled to use questions which, if asked by a lawyer, would be considered leading and suggestive. Nor, the court found, did the plaintiff prove bias and hostility on the doctor's part, noting that over a period of time the doctor had examined an equal number of injured litigants at the request of lawyers for both plaintiffs and defendants. The court further observed that by making serious and unsupported accusations against the physician, the plaintiff's attorney himself created an atmo-

sphere of hostility that could only make it more difficult to determine the truth about the plaintiff's physical condition. The court determined that the trial judge adequately protected the plaintiff's interests by requiring the physician to refrain from questioning the plaintiff on matters pertinent only to a determination of liability, by ordering that any recordings made during the examination be preserved for later production at trial, and by allowing the plaintiff's husband to attend the examination.

Despite an affidavit by a personal injury plaintiff's attorney, stating that in his experience doctors conducting physical examinations for defendants sometimes improperly question the plaintiff concerning details germane only to negligence and liability issues, and that the particular physician designated by the instant defendant to physically examine the plaintiff once had a different plaintiff examined by other doctors without authority to do so, the court in Simon v Castille (1965, La App 3d Cir) 174 So 2d 660, application den 247 La 1088, 176 So 2d 145 and cert den 382 US 932, 15 L Ed 2d 344, 86 S Ct 325, held proper the trial judge's order that the examination be conducted without the plaintiff's attorney in attendance. The court commented that the affidavit essentially indicted all physicians conducting physical examinations for defendants as "agents" of those parties, who will conduct their examinations improperly and testify at the trial so as to favor the defendant. The court explained that such a premise cannot be accepted, and that it must be presumed that doctors will conduct their physical examinations properly. The court acknowledged that if for good cause shown the trial judge decides that a particular doctor may act improperly, he may refuse the request for an examination, designate another doctor in whom he has confidence, limit the scope of the examination, or require as a condition that the plaintiff's counsel be present. However, the court concluded, no such cause had been shown in the instant case.[33]

[b] Of attorney or legal representative

The courts in the following cases held improper orders by the trial judge that the plaintiff submit to a physical examination by the defendant's designated physician without attendance by the plaintiff's attorney or legal representative, in the absence of sufficient proof that the attorney or representative would interfere with the examination or had previously attempted to do so.

Noting the absence of proof or findings by the trial judge to support a personal injury defendant's claim that a law clerk employed by the plaintiff's attorney, who accompanied the plaintiff to a physical examination to be conducted by a defense-designated physician, interfered with the examination by refusing to permit the plaintiff to sign various releases, to answer certain questions asked of her by the doctor's secretary, or to remove her clothing at the doctor's request, the court in Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612, held that the judge abused his discretion, following the doctor's termination of the examination, in ordering that the plaintiff submit to further physical examination by the doctor in the absence of the plaintiff's attorneys or anyone representing them.

Finding nothing in the record to indicate that the personal injury plaintiffs' attorney would interfere with the conduct of a physical examination of one of the plaintiffs by the defendants' designated physician, the court in Lamendola v Slocum (1989, 3d Dept) 148 App Div 2d 781, 538 NYS2d 116, held that the trial judge erred in granting the defendants' motion that the examination be conducted without the attorney's presence.

§ 10. Presence of other third person

The court in the following case held that a personal injury plaintiff was entitled to her attorney's presence during her physical examination by the defendant's designated physicians, notwithstanding the defendant's proposal that a court reporter attend the examination in lieu of plaintiff's counsel.

The plaintiff in a personal injury action was entitled to have her attorney present during a pretrial physical examination to be made by doctors on behalf of the defendant, ruled the court in Munoz v Superior Court of Santa Clara County (1972, 1st Dist) 26 Cal App 3d 643, 102 Cal Rptr 686, despite the defendant's proferred stipulation that in lieu of counsel's attendance, a court reporter could be present at the time of examination, with all questions by the doctor subject to objections to be ruled on by the trial judge. The defendant argued that this arrangement, which the plaintiff rejected, would be sufficient to protect the plaintiff from any improper questioning. Rejecting this claim, the court reasoned that while a plaintiff may have a court reporter present to insure the accurate reporting of what occurs during the examination, this does not substitute for an attorney's presence, which serves the different purpose of preventing inquiries not reasonably related to the examination's legitimate scope.

But in Robin v Associated Indem. Co. (1973, La) 297 So 2d 427, the facts of which are more fully discussed in § 9[a], the court held that the trial judge in a personal injury action did not abuse his discretion in denying the plaintiff's request that her attorney be present during her physical examination by the defendant's designated physician, despite allegations that that physician was rude, biased in the defendant's favor, and had conducted examinations of others in an improper manner, finding that the judge adequately protected the plaintiff's interests by allowing her husband to attend the examination.

B. Presence of Examinee's Physician

1. General Rules

§ 11. View that examinee ordinarily may have physician present

In the following cases, the courts

33. This case may have been overruled, to the extent it recognized a general rule against counsel attendance at adverse medical examinations and imposed on plaintiffs the burden to show special need before such attendance could be permitted, in Robin v Associated Indem. Co. (1973, La) 297 So 2d 427, § 8.

held or recognized that ordinarily, a party in a civil action may have his or her own physician present during a physical examination of the party by an opponent's doctor or medical expert.

US—Sanden v Mayo Clinic (1974, CA8 Minn) 495 F2d 221, 18 FR Serv 2d 1439 (attendance by physician usually permitted, subject to court's discretion).

Dziwanoski v Ocean Carriers Corp. (1960, DC Md) 26 FRD 595, 4 FR Serv 2d 640 (if examinee informs doctor and attorney for other side); Warrick v Brode (1969, DC Del) 46 FRD 427, 13 FR Serv 2d 992 (same).

Fla—Bartell v McCarrick (1986, Fla App D4) 498 So 2d 1378, 12 FLW 79 (subject to court's discretion).

Ga—Pollard v Page (1937) 56 Ga App 503, 193 SE 117.

Idaho—Greenhow v Whitehead's, Inc. (1946) 67 Idaho 262, 175 P2d 1007.

Ohio—Francisco v Hoffman (1955, CP) 60 Ohio Ops 371, 74 Ohio L Abs 420, 131 NE2d 692.[34]

The court in Warrick v Brode (1969, DC Del) 46 FRD 427, 13 FR Serv 2d 992, while ruling that an attorney generally may not be present when his client is physically examined by an opponent's designated physician under Rule 35 of the Federal Rules of Civil Procedure, stated that as an alternative means of protecting the examinee's interests, a physician of the examinee's choice may attend, if the examinee communicates his or her wish therefor to the doctor and attorney for the other side.

And the court in Greenhow v Whitehead's, Inc. (1946) 67 **Idaho** 262, 175 P2d 1007, observing that a personal injury plaintiff was entitled to have her own attending physician present during her physical examination by the defendant's doctors, ruled that the trial judge improperly dismissed the case after the plaintiff failed to appear for the examination, because the judge's order fixed the time for the examination as 12:30 p.m. on the very day the order was issued, leaving the plaintiff insufficient time to arrange to have her doctor present.

◆

See the following additional cases, apparently involving no actual dispute as to whether a personal injury plaintiff could have his or her own doctor present during a physical examination of the plaintiff by the defendant's designated

34. This case may have been overruled by State ex rel. Lambdin v Brenton (1970) 21 **Ohio** St 2d 21, 50 Ohio Ops 2d 44, 254 NE2d 681, § 8, to the extent it recognized that a personal injury plaintiff is generally entitled to have counsel present during his or her physical examination by the defendant's designated physician.

See also Carpenter v Dawson (1954, CP) 60 **Ohio** Ops 373, 74 Ohio L Abs 257, 138 NE2d 172, an unspecified type of civil action, in which the trial court, without clearly indicating whether the defendant sought to have the plaintiff physically examined by doctors of its own choosing, ruled that under the circumstances of the case, the defendant was entitled to have the plaintiff undergo a reasonable physical examination, with the right of the plaintiff to have his physician present during the examination.

physician, in which the courts issued an order, or approved on other grounds an order issued by or proposed to the trial judge, permitting one or more doctors of the plaintiff's choice to attend the examination.

US—Klein v Yellow Cab Co. (1944, DC Ohio) 7 FRD 169, 60 Ohio Ops 369, 74 Ohio L Abs 337.

Ohio—S.S. Kresge Co. v Trester (1931) 123 Ohio St 383, 9 Ohio L Abs 349, 175 NE 611.

Pa—Hess v Lakeshore & M. S. R. Co. (1890) 7 Pa Co 565.

Wis—White v Milwaukee C. R. Co. (1884) 61 Wis 536, 21 NW 524.

§ 12. —But court may bar physician if opponent establishes need for exclusion

The court in the following case held that while a personal injury plaintiff ordinarily may have his or her own doctor present during a physical examination by the defendant's designated physician, the trial judge has discretion to order that the examination be conducted without the examinee's physician present, if the opponent sustains the burden of establishing a need to conduct the examination without him.

In Bartell v McCarrick (1986, **Fla** App D4) 498 So 2d 1378, 12 FLW 79, the court declared that although a personal injury plaintiff subjected to a compulsory physical examination by the defendant's chosen physician ordinarily may have his or her own doctor present during the examination, the trial judge may prohibit attendance by the plaintiff's physician, in his sound discretion, if the defendant sustains the burden of establishing a valid reason why the examination should be conducted without that physician. The court observed that an examining doctor selected by the defendant is not necessarily indifferent to the parties' conflicting interests. However, the court explained, a variety of factors may militate against a hard-and-fast rule regarding attendance by the plaintiff's doctor, such as language barriers, inability to engage a physician who will perform the examination in a third person's presence, the patient's particular physical or psychological needs, and the local customs and practices of the bar and medical profession. Accordingly, the court reasoned, trial judges are in the best position to decide the issue of attendance by the plaintiff's physician on a case-by-case basis.

§ 13. View that attendance by examinee's physician allowable, in special circumstances

While not taking a clear position generally approving or disapproving attendance by a civil party's own doctor at a physical examination of the party by an opponent's physician, the courts in the following cases held or recognized that in special circumstances the trial judge may, in his discretion, permit the examinee to have his or her own physician present during the examination.

The court in Simon v Castille (1965, **La** App 3d Cir) 174 So 2d 660, application den 247 La 1088, 176 So 2d 145 and cert den 382 US 932, 15 L Ed 2d 344, 86 S Ct 325, indicated that whether a personal injury plaintiff may have his

or her own physician attend a physical examination by the defendant's doctor is a matter for the trial judge's discretion, and that the plaintiff must show special circumstances warranting the physician's presence. The court observed that if, for example, a female plaintiff objected to being examined by a strange physician without the presence of her own doctor, a relative, or other person, this might be good cause for requiring, as a condition of the examination, that it be conducted in such third person's presence.[35]

Without taking a clear position generally approving or disapproving attendance by a personal injury plaintiff's own doctor at a physical examination conducted by the defendant's physician, the court in Wood v Chicago, M., S. P. & P. R. Co. (1984, **Minn** App) 353 NW2d 195, commented that in "exceptional cases" the trial judge may feel compelled to condition an order for such an examination on a requirement that it be performed in the presence of the plaintiff's physician. The court expressed agreement with the proposition that while an examinee does not have a general right to his attorney's presence during the examination, he may properly ask that his personal doctor attend, in order to insure that the examination follows any procedures or conditions specified by the judge.

See Mertz v Bradford (1989, 4th Dept) 152 App Div 2d 962, 543 NYS2d 786, in which the court, without expressing a view generally approving or disfavoring attendance by the examinee's own doctor at a physical examination by an opponent's physician, held that the plaintiffs in an unspecified type of civil action failed to demonstrate "special circumstances" warranting the presence of their own medical representative at a physical examination to be conducted by doctors designated for that purpose by the defendants.

§ 14. View that examinee not entitled to physician's presence

The court in the following case held that a personal injury plaintiff has no unqualified right to the presence of his or her own doctor during a physical examination by the defendant's physician, because attendance by an attorney or court reporter is adequate to protect the plaintiff's interests.

In Long v Hauser (1975, 4th Dist) 52 **Cal** App 3d 490, 125 Cal Rptr 125, the court held that a personal injury plaintiff has no unqualified right, during a physical examination by the defendant's chosen doctor, to the presence of his or her own physician. The court observed that the plaintiff is entitled to have an attorney and a court reporter attend the examination, and reasoned that their presence adequately discourages inquiries not reasonably related to

35. To the extent the court similarly required of the plaintiff a showing of special circumstances before permitting attendance by his or her attorney, this case may have been overruled by Robin v Associated Indem. Co. (1973, **La**) 297 So 2d 427, § 8, in which the court apparently took the position that whether a plaintiff's lawyer should be allowed to attend an adverse physical examination of his client is simply a matter for the trial judge's discretion.

the examination's legitimate scope, which is to discover the true nature and extent of the injuries claimed. This purpose can best be achieved, the court explained, by divesting the examination as far as possible of any adversary character, and by strictly limiting the number of unessential participants.

2. Under Particular Circumstances

§ 15. Embarassment of female examinee

In the following case, the court declared that a female personal injury plaintiff's objection to a physical examination by an unfamiliar doctor acting for the defendant, without the presence of her own physician, might justify a requirement that the examination be conducted in that physician's presence.

The court in Simon v Castille (1965, **La** App 3d Cir) 174 So 2d 660, application den 247 La 1088, 176 So 2d 145 and cert den 382 US 932, 15 L Ed 2d 344, 86 S Ct 325, ruling that it was within the trial judge's discretion whether to allow a personal injury plaintiff's physician to attend the plaintiff's physical examination by the defendant's designated doctor, based on the plaintiff's showing of special circumstances warranting her physician's presence,[36] stated that a female plaintiff's objection to being examined by a strange physician, without the presence of her own doctor, might constitute good cause for imposing a condition on the examination requiring that it be conducted in that doctor's presence.

See Sanden v Mayo Clinic (1974, CA8 Minn) 495 F2d 221, 18 FR Serv 2d 1439, the facts of which are more fully discussed in § 16, in which the court held that the trial judge in a medical malpractice action, involving an allegedly negligent radical hemorrhoidectomy, did not abuse his discretion by requiring the female plaintiff to undergo a mid-trial physical examination and testing of her anal sphincter muscle by the defendants' medical expert, without the presence of her own physicians, where the plaintiff, who was a registered nurse, advanced no argument that a physician of her own choosing was needed to protect her privacy, or to shield her from embarrassment.

§ 16. Subsequent examination by examinee's own doctors

The trial judge in a personal injury action did not prejudicially err in ordering that the plaintiff be physically examined by the defendant's medical expert without a doctor of her choice in attendance, ruled the court in the following case, where the plaintiff's own physician examined her a few hours after the adverse examination, and three other doctors who examined the plaintiff testified in her behalf.

36. To the extent the court similarly required of the plaintiff a showing of special circumstances before permitting attendance by his or her attorney, this case may have been overruled by Robin v Associated Indem. Co. (1973, **La**) 297 So 2d 427, § 8, in which the court apparently took the position that whether a plaintiff's lawyer should be allowed to attend an adverse physical examination of his client is simply a matter for the trial judge's discretion.

In Sanden v Mayo Clinic (1974, CA8 Minn) 495 F2d 221, 18 FR Serv 2d 1439, the court held that the trial judge in a medical malpractice action did not abuse his discretion by requiring the plaintiff to undergo a physical examination by the defendants' medical expert, without the presence of a physician chosen by the plaintiff, where her own doctor examined her shortly afterward. The plaintiff alleged that the her anal sphincter muscle and associated nerves were permanently damaged through the negligent performance of a radical hemorrhoidectomy, while the defendant hospital and physicians claimed that the plaintiff was feigning the alleged injury. The examination, ordered on the third day of trial, was to include an electromyographic study of the plaintiff's anal sphincter, which distinguishes healthy, intact nerves from damaged ones. The examining physician testified at trial that the electromyograph indicated that the muscles and nerves in question were normal, and that any abnormal reaction displayed by the plaintiff resulted from her purposeful efforts to determine the test's outcome. This doctor's conclusions were contradicted by the testimony of three other physicians who examined the plaintiff and testified in her behalf. The plaintiff argued that the judge's refusal to allow one of her physicians to attend the adverse medical examination was prejudicially erroneous, because of the importance of the electromyographic study in resolving the disputed factual questions, and because of the conflicting testimony elicited regarding the test results. Rejecting this claim, the court pointed out that the plaintiff's own physician examined her a few hours after the adverse examination, and that the jury had before it extensive medical evidence in addition to testimony by the defendants' expert, from a variety of doctors, upon which to base its findings of fact. In this context, the court concluded, no prejudice resulted from the judge's refusal to permit the plaintiff's own physician to attend the adverse examination.

III. Mental Examination

A. Presence of Examinee's Attorney

1. General Rules

§ 17. View that examinee ordinarily may have attorney present

The courts in the following cases held or recognized that a civil litigant subjected to a mental examination by an opponent's designated physician ordinarily may have his or her attorney present during the examination, except, as parenthetically indicated, where the attorney interferes with the examination or the opponent shows a need to conduct the examination without counsel.

US—Zabkowicz v West Bend Co. (1984, ED Wis) 585 F Supp 635, 35 BNA FEP Cas 209, 39 FR Serv 2d 1294, later proceeding (ED Wis) 589 F Supp 780, 35 BNA FEP Cas 610, 35 CCH EPD ¶ 34766, later proceeding (ED Wis) 601 F Supp 139, 36 BNA FEP Cas 1540, 37 CCH EPD ¶ 35242, affd in part and revd in part (CA7 Wis) 789 F2d 540, 40 BNA FEP Cas 1171, 40 CCH EPD ¶ 36089, 4 FR Serv 3d 1229 (disagreed with on other grounds by multiple cases as stated in Huffman v Hains (CA7 Ind) 865 F2d 920).

Alaska—Langfeldt-Haaland v Saupe Enterprises, Inc. (1989, Alaska) 768 P2d 1144, 84 ALR4th 547.

Ill—Eskandani v Phillips (1975) 61 Ill 2d 183, 334 NE2d 146 (statute expressly providing).

Mich—Nemes v Smith (1971) 37 Mich App 124, 194 NW2d 440 (rule expressly providing).[37]

NY—Ponce v Health Ins. Plan (1984, 2d Dept) 100 App Div 2d 963, 475 NYS2d 102 (as long as attorney does not interfere with examination); Nalbandian v Nalbandian (1986, 2d Dept) 117 App Div 2d 657, 498 NYS2d 394.

Reardon v Port Authority of New York & New Jersey (1986) 132 Misc 2d 212, 503 NYS2d 233 (absent compelling showing of need for examination without attorney); Gray v Victory Memorial Hosp. (1989) 142 Misc 2d 302, 536 NYS2d 679.

For Ohio cases, see § 20.

Pa—Koch v Galardi (1979, Pa CP Allegheny Co) 11 D&C 3d 750 (absent showing that counsel's presence will interfere with examination).

Wash—Tietjen v Department of Labor & Industries (1975) 13 Wash App 86, 534 P2d 151.

In Zabkowicz v West Bend Co. (1984, ED Wis) 585 F Supp 635, 35 BNA FEP Cas 209, 39 FR Serv 2d 1294, later proceeding (ED Wis) 589 F Supp 780, 35 BNA FEP Cas 610, 35 CCH EPD ¶ 34766, later proceeding (ED Wis) 601 F Supp 139, 36 BNA FEP Cas 1540, 37 CCH EPD ¶ 35242, affd in part and revd in part (CA7 Wis) 789 F2d 540, 40 BNA FEP Cas 1171, 40 CCH EPD ¶ 36089, 4 FR Serv 3d 1229 (disagreed with on other grounds by multiple cases as stated in Huffman v Hains (CA7 Ind) 865 F2d 920), in which a female employee and her husband sought damages from the wife's employer and co-workers for emotional distress caused by sexual harassment on the job, the court ruled that the plaintiffs were entitled to have legal counsel present during their mental examination by a defense psychiatrist. The plaintiffs argued that attendance by a third party was necessary to assure that the defendants' expert did not probe beyond permissible limits, and that an unsupervised examination could easily be transformed into a de facto deposition. The defendants asserted that a third party's presence might create inhibitions detrimental to a psychiatric interview. The court explained that in the context of an adversary proceeding, the plaintiffs' interest in protecting themselves from unsupervised interrogation by their oppo-

37. In Feld v Robert & Charles Beauty Salon (1989) 174 Mich App 309, 435 NW2d 474, app gr, in part 433 Mich 879, 446 NW2d 169 and revd on other grounds 435 Mich 352, a later workers' compensation case, the court referred to the general discovery rule cited in Nemes as "then applicable," but did not mention any new or amended rule. Accordingly, the reader is advised to consult the latest compilation of Michigan civil procedure rules to verify the current status of the one applied in Nemes.

nents' agent outweighed the defendants' interest in making the most effective use of their expert. The court observed that this expert was being engaged to advance the defendants' interests, and therefore could not be considered a neutral party. The court also found that the defendants might derive numerous advantages from an unsupervised examination, unrelated to the emotional damage issue. The court concluded that the role of the defendants' expert in the truth-seeking process was not sufficiently impartial to justify the license which the defendants sought.

See Barraza v 55 West 47th Street Co. (1989, 1st Dept) 156 App Div 2d 271, 548 NYS2d 660, in which the court, citing Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612, § 3, but not expressing a view as to an examinee's general right to the presence of counsel or an opponent's burden to establish the need for examination without counsel, stated that a decision whether to exclude the examinee's attorney, on the ground that his presence might interfere with the examination, must be considered in the light of the facts and circumstances of each case.

The plaintiff in a personal injury action may have his or her attorney present during a mental examination conducted at the defendant's instance by a physician of its choice, absent a compelling showing that the examination needs to be conducted outside the attorney's presence, ruled the court in Reardon v Port Authority of New York & New Jersey (1986) 132 Misc 2d 212, 503 NYS2d 233. Citing Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612, § 3, the court reasoned that the possible adversary status of the defendant's examining doctor is ordinarily a compelling reason to permit attendance by plaintiff's counsel, so as to guarantee, for example, that the doctor does not interrogate the plaintiff on liability questions in order to obtain damaging admissions. In addition, the court explained, information obtained by the plaintiff's attorney at the examination, concerning the way in which it was conducted, may be helpful on cross-examination. The court noted an affidavit in the instant case by the defendant's proposed examining psychiatrist, stating that the presence of the plaintiff's attorney during the examination, as an interested third party, would be inappropriate and would invalidate the examination. The court, however, found such claims conclusory, self-serving, and not supported by any independent authority. In any event, the court stated, conduct by an attorney amounting to actual interference with the examination may be dealt with by the trial judge.

And in Tietjen v Department of Labor & Industries (1975) 13 Wash App 86, 534 P2d 151, the court held that a plaintiff required to submit to a psychiatric examination by the defendant's designated physician, pursuant to the state's counterpart to Rule 35 of the Federal Rules of Civil Procedure, is entitled to have his attorney present at the examination.[38] The court observed that a plaintiff is generally entitled to have his attorney present during a physical examination requested by the defendant, and found no basis for applying a different rule to psychiatric examinations. The court reasoned that such an examination is a legal proceeding, at which the plaintiff is entitled to representation. The court pointed out that a confidential or privileged physician-patient relationship does not exist where the plaintiff in a personal injury action is examined by a physician at the defendant's request. Moreover, the court noted, there may be questions which the plaintiff may refuse to answer, such as those involving possible self-incrimination. An attorney insures that the procedure, tests, and results are reported accurately, the court explained, and that the examination does not become a deposition as to the facts in issue. The court commented that any unnecessary interference caused by an attorney can be alleviated by specific court order.

§ 18. View that examinee generally has no right to presence of attorney

Generally reasoning that a third person's presence during a mental examination necessarily interferes with the close communication between examinee and physician necessary to the procedure's effectiveness, the courts in the following cases held or recognized that a civil litigant, subjected to a mental examination at an opponent's instance by a physician of the opponent's choice, generally has no right to the presence of his or her attorney during the examination.

US—Brandenberg v El Al Israel Airlines (1978, SD NY) 79 FRD 543, 25 FR Serv 2d 18; Neumerski v Califano (1981, ED Pa) 513 F Supp 1011; Lowe v Philadelphia Newspapers, Inc. (1983, ED Pa) 101 FRD 296, 44 BNA FEP Cas 1224, 37 FR Serv 2d 1154, later proceeding (ED Pa) 594 F Supp 123, 79 ALR Fed 207; Cline v Firestone Tire & Rubber Co. (1988, SD W Va) 118 FRD 588; Wheat v Biesecker (1989, ND Ind) 125 FRD 479.

Ariz—Pedro v Glenn (1968) 8 Ariz App 332, 446 P2d 31; Burton v Industrial Com. (1990, Ariz App) 67 Ariz Adv Rep 28.

Cal—Edwards v Superior Court of Santa Clara County (1976) 16 Cal 3d 905, 130 Cal Rptr 14, 549 P2d 846; Vinson v Superior Court (1987) 43 Cal 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301.

Whitfield v Superior Court of Los Angeles County (1966, 2nd Dist) 246 Cal App 2d 81, 54 Cal Rptr 505.

Del—Rochen v Huang (1988, Del Super) 558 A2d 1108.

For Ohio cases, see § 20.

Wis—Karl v Employers Ins. of Wausau (1977) 78 Wis 2d 284, 254 NW2d 255.

38. While the particular matter before the court involved a workers' compensation claim, the court ruled that the state's Rule 35 counterpart applied in all civil proceedings.

The court in Pedro v Glenn (1968) 8 **Ariz** App 332, 446 P2d 31, recognized that a civil litigant mentally examined at an opponent's instance by its designated physician is not generally entitled to have an attorney present during the examination, and ruled that the trial judge in a personal injury action abused his discretion by conditioning the defendants' right to discovery, through a psychiatric examination of the plaintiffs under the state's counterpart to Rule 35 of the Federal Rules of Civil Procedure, on a requirement that the examination be conducted in the "unobtrusive" presence of the plaintiffs' counsel or a court reporter. The plaintiffs urged that the presence of their attorney or a court reporter during the examination was a matter of right, that it was necessary to protect them from improper questions on privileged matters,[39] and that the trial judge's order was authorized by language in the applicable rule permitting the judge to specify the "conditions" of the examination. The defendants, on the other hand, presented an affidavit by the appointed examining physician, who stated that a third person's presence during the examination would cause the examinees to consciously or unconsciously alter or disguise their responses, and that this would undermine the validity of any psychiatric evaluation based on the interview. Agreeing with the defendants, the court explained that while a judge has broad discretion to condition examinations under the rule, his actions must be reasonable under the circumstances of the case. The court commented that given the avowed purpose for having an attorney present during the examination, it was difficult to visualize his "unobtrusive presence" as contemplated by the judge's order. A psychiatric interview is useless, the court declared, if it cannot be carried out in an atmosphere conducive to the formulation of a sound professional opinion. The court observed that certain questions are necessary in such an interview which go beyond those usually asked of a patient in a physical examination. The court also rejected the notion that merely because an appointed physician is suggested by a defendant, his testimony is necessarily suspect. As an alternative to a lawyer's presence, the court explained, the examinee may request a copy of the physician's report, and may thereafter take the doctor's deposition, where he has an opportunity to lay a foundation for objections before and during presentation of the medical evidence at trial. Another possible alternative, the court commented, is to withdraw claims for psychiatric damage.

In Edwards v Superior Court of Santa Clara County (1976) 16 **Cal** 3d 905, 130 Cal Rptr 14, 549 P2d 846, a personal injury action claiming emotional damages, the court held that a civil litigant is not entitled to have his or her attorney present during a psychiatric examination conducted of the litigant by an opposing party's chosen physician. The court observed that the statute authorizing such examinations neither expressly nor impliedly required the presence of counsel for the examinee. The court acknowledged its earlier holding in Sharff v Superior Court of San Francisco (1955) 44 **Cal** 2d 508, 282 P2d 896, 64 ALR2d 494, § 3, that a personal injury plaintiff may not be required to submit to a physical examination by the defendant's doctor without the presence of an attorney, but declared that this rule does not apply to mental examinations. The court reasoned that unlike a physical examination, a psychiatric interview is almost wholly devoted to a careful probing of the examinee's mind in order to accurately determine his mental condition, requiring a degree of rapport between the physician and examinee that may be hindered by the presence and participation of counsel. Therefore, the court said, a psychiatric examination should ordinarily be conducted without an attorney if it is to be an effective device for ascertaining the truth. The court further found that the presence of counsel is not an appropriate means to protect the examinee from "improper" questions, because an attorney lacks the specialized knowledge and skill necessary to discern the value of questions which might be legally objectionable if posed in a courtroom, but are very relevant in the formulation of a sound psychiatric judgment. The court also explained that permitting the lawyer to attend a psychiatric examination for purposes of lending the examinee comfort or support presents difficult questions of limitation, since a relative, religious adviser, or psychiatric counselor might furnish still better support, yet reduce the likelihood of establishing the rapport necessary to a meaningful interview. Nor is counsel's presence required to assure accuracy in reporting the examination, said the court; if the examinee knows his statements are being recorded verbatim, he might react defensively, thereby preventing the free, open, and objective communication essential to an effective psychiatric examination. The court stressed the availability of other procedural devices to protect the examinee's interests, such as deposition of the examiner and discovery of his notes and records; the assistance of a favorable psychiatric expert to contradict the examiner's conclusions or prompt the attorney before or during trial into every conceivable area of legitimate inquiry; and the availability of cross-examination to test the examiner's conclusions and reasoning, and to reveal the specific questions and answers exchanged between the examiner and examinee. The court concluded that, particularly where the examinee's own psychiatrist has had prolonged and unlimited access to the examinee for analysis and treatment, fundamental fairness requires that a similar unrestricted professional exposure for a brief period be allowed to the other side.[40]

39. The plaintiffs specifically claimed that without their lawyer in attendance, they might be questioned in violation of their right against self-incrimination regarding possibly excessive narcotics use by one of the plaintiffs due to his injuries.

40. The rule announced in this case was clarified in Vinson v Superior Court (1987) 43 **Cal** 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301, § 19.

§ 19. —But court may admit attorney if examinee shows good cause for counsel's presence

In the following cases, the courts held or recognized that while a civil litigant mentally examined by an opponent's designated physician generally has no right to the presence of his or her attorney during the examination, the trial judge has discretion to permit the lawyer to attend, if the examinee sustains the burden of establishing good cause for counsel's presence.

The court in Cline v Firestone Tire & Rubber Co. (1988, SD W Va) 118 **FRD** 588, a personal injury action, stated that a civil litigant mentally examined by an opponent's physician, pursuant to Rule 35 of the Federal Rules of Civil Procedure, should not be allowed to have his or her attorney present during the examination, unless the examinee shows good cause for the lawyer's attendance.

In Vinson v Superior Court (1987) 43 **Cal** 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301, the court declared that while a civil litigant is not generally entitled to the presence of counsel at his or her mental examination by an opponent's physician, it is within the trial judge's discretion to allow attendance by the attorney in an individual case, where the examinee shows good cause to permit such attendance. The court stated that its earlier holding in Edwards v Superior Court of Santa Clara County (1976) 16 **Cal** 3d 905, 130 Cal Rptr 14, 549 P2d 846, § 18, should be viewed as standing for the proposition that the presence of an attorney is not required during a mental examination. The court explained that in light of their broad discretion in discovery matters, trial judges retain the power to permit counsel's presence, or to take other prophylactic measures when needed.

For Ohio cases, see § 20.

And in Karl v Employers Ins. of Wausau (1977) 78 **Wis** 2d 284, 254 NW2d 255, the court held that while counsel generally will not be allowed to attend a personal injury plaintiff's mental examination by a physician of the defendant's choice, the matter of such attendance remains within the trial judge's sound discretion, and may be permitted if the plaintiff sustains the burden of showing need for the attorney's presence or prejudice if counsel is not allowed to attend. The court adopted the reasoning of Whanger v American Family Mut. Ins. Co. (1973) 58 **Wis** 2d 461, 207 NW2d 74, § 7, in which it was observed that while medical examinations are not adversary proceedings per se, and counsel's presence ordinarily adds nothing to their adequacy, a particular plaintiff's personality or sophistication may be such that counsel could give him assurance and assist in communicating, thereby aiding the physician and facilitating a more accurate examination, and that there may be instances of hostility between the physician and the plaintiff, or reluctance or fear on the latter's part.

§ 20. Ohio cases

Ohio courts have taken divergent positions on the extent of a civil litigant's right to the presence of counsel during a mental examination by the opponent's physician. In the following case, the court held that a personal injury plaintiff's attorney may be excluded from a mental examination of the client conducted by the defendant's doctor, if the doctor reasonably objects to the lawyer's presence, except that counsel may attend that portion of the examination seeking information on the facts of the accident and the plaintiff's injuries at that time.

In Kelley v Smith & Oby Co. (1954, CP) 70 **Ohio** L Abs 202, 129 NE2d 106, the court held that absent preponderating evidence that the best psychiatric practice permits or precludes the attendance of third persons at a psychiatric interview, a personal injury plaintiff's attorney may be excluded from a mental examination of the plaintiff conducted by a physician on the defendant's behalf, if such physician reasonably objects to the attorney's presence, except that counsel may attend that portion of the examination seeking information as to the facts of the accident and injuries sustained by the plaintiff at that time. The court acknowledged that a plaintiff's counsel may generally attend a physical examination conducted at the defendant's instance, but noted an affidavit by the instant defendant's psychiatric expert that a mental examination cannot be properly performed in the presence of interested third persons, which causes a patient to consciously or unconsciously guard, alter, or disguise his responses, and that any diagnosis or evaluation of a patient's condition is of questionable validity where the examination is performed with such persons present. The plaintiff, on the other hand, submitted an affidavit by another psychiatrist, who stated that the exclusion of third persons is not necessary for a proper psychiatric examination. The court stated that given this conflict, the controlling criterion should be the reasonable wishes of the examining psychiatrist, who bears the responsibility of rendering an honest and authentic appraisal of the plaintiff's condition. The court found reasonable the defense psychiatrist's insistence that a third person's presence during the interview would result in distorted responses, given the purely subjective nature of a psychiatric examination. Nevertheless, the court concluded, such an examination must be limited to the plaintiff's claims of physical or mental injury, pain, and suffering, and the prior physical and mental history of the plaintiff and his family. Questions regarding the facts of the accident are permissible only in so far as they relate to the nature and extent of the injuries sustained at that time, the court emphasized, and such questions must be put to the plaintiff in his attorney's presence.[41]

But in Nomina v Eggeman

41. The court distinguished neurological examinations, involving nervous and muscular reactions not subject to the patient's will nor influenced by the presence of a third party, which, the court said, must be open to the plaintiff's counsel like other physical examinations. However, this case may have been overruled by State ex rel. Lambdin v Brenton (1970) 21 **Ohio** St 2d 21, 50 Ohio Ops 2d 44, 254 NE2d 681, § 8, to the extent it recognized

(1962, CP) 26 **Ohio** Ops 2d 122, 90 Ohio L Abs 57, 188 NE2d 440, the court held that a personal injury plaintiff subjected to a psychiatric examination by the defendant's doctor is entitled to have his or her attorney present during the examination. The court acknowledged the ruling in Kelley v Smith & Oby Co. (1954, CP) 70 **Ohio** L Abs 202, 129 NE2d 106 (this section), that the plaintiff can be compelled to undergo a psychiatric examination without counsel's presence, based on the examining physician's opinion that the interview can be effective only on that basis, but found no legal authority supporting that view. Instead, the court expressed its agreement with the reasoning of Sharff v Superior Court of San Francisco (1955) 44 **Cal** 2d 508, 282 P2d 896, 64 ALR2d 494, § 3, that the plaintiff's attorney should be allowed to attend an examination by the defendant's physician in order to protect his client from improper questioning as to medically irrelevant or confidential matters, and stated that in a compelled psychiatric examination by the defendant's physician, the plaintiff is required only to answer such questions as may be properly asked of him at a deposition with counsel present. The court commented that while this rule might restrict psychiatric examinations to some degree, it represented a reasonable compromise between the utmost discovery and the rights of the plaintiff.

Likewise, the court in State ex rel. Staton v Common Pleas Court (1964, Franklin Co) 4 **Ohio** App 2d 10, 33 Ohio Ops 2d 9, 211 NE2d 63, relying on the Nomina Case and agreeing with its opinion that the holding in Kelley v Smith & Oby Co. (1954, CP) 70 **Ohio** L Abs 202, 129 NE2d 106 (this section), lacked decisional authority, ruled that a plaintiff could not be compelled to submit to a psychiatric examination, apparently sought by the defendant in a personal injury action, without the presence of her attorney.

2. Effect of Particular Circumstances or Claims

§ 21. Examinee's emotional state[42]

The court in the following case held that a plaintiff claiming emotional injury did not have a right to her lawyer's presence during her mental examination by the defendant's psychiatrist, although she expressed dislike and fear of the doctor, and despite her own psychiatrist's affirmation that it might be dangerous for her to be examined without the support of counsel, given her history of severe depression.

In Edwards v Superior Court of Santa Clara County (1976) 16 **Cal** 3d 905, 130 Cal Rptr 14, 549 P2d 846, the court held that a personal injury plaintiff alleging emotional damages was not entitled to have her attorney present during her mental examination by the defendant's designated psychiatrist, despite her expressed dislike and fear

that a personal injury plaintiff is generally entitled to have counsel present during his or her physical examination by the defendant's designated physician.

42. For cases involving emotional distress due to possible inquiry into sexual matters, see § 22.

of that doctor, and although her own psychiatrist submitted an affidavit stating that given the plaintiff's history of severe depression, it might be dangerous to subject her to a psychiatric examination without the presence of someone with whom she could identify as a supporting force, such as her attorney. The plaintiff argued that counsel's presence would give her comfort, assurance, and emotional support when facing a hostile examination. The court, however, reasoned that depending on the examinee's mental condition, any psychiatric examination, including one by the examinee's own expert, might be viewed by the examinee as hostile. The court further explained that to permit the presence of others at a psychiatric examination for purposes of comfort and support presented difficult questions of limitation. The court stated that while a family member, religious adviser, or the examinee's own psychiatric counselor might furnish the best comfort and emotional support, the prospects of establishing that degree of rapport necessary to a meaningful psychiatric examination declined as the number of persons attending the examination increased. The court commented that while trial judges have discretion to issue protective orders when necessary to safeguard the examinee's physical or mental condition, authorizing the addition of other persons in the examining room would be distracting or disruptive. The court concluded that since the plaintiff's own psychiatrist had had months or years of unlimited private access to the plaintiff for analysis and treatment, fundamental fairness required that a similar unrestricted professional exposure for a brief period be allowed to the other side.

However, the court in Karl v Employers Ins. of Wausau (1977) 78 **Wis** 2d 284, 254 NW2d 255, found it proper for a personal injury plaintiff's attorney to attend his client's psychiatric examination by the defendants' physician, because of the plaintiff's distressed emotional state at the time of the examination, and ruled that the trial judge did not err in refusing to preclude cross-examination of the physician at trial concerning portions of the examination that plaintiff's counsel had observed, although his attendance was unknown to the defendants when the examination took place. The court acknowledged that while counsel's presence at the examination may be appropriate where the plaintiff's character, personality, or sophistication are such that an attorney could give him assurance and confidence, and assist him in communicating, the plaintiff bears the burden of showing a need for counsel's presence. Noting that the examination had been arranged by stipulation rather than court order, the court reasoned that while the defendants had a right to assume that plaintiff's counsel would not be present at the examination absent notice to the contrary, evidence that the plaintiff was tense, anxious, and near tears during the interview for reasons other than counsel's presence, together with the physician's failure to express any dissatisfaction with his attendance, would have justified the trial judge in allowing the attorney to attend had a request been made in advance.

§ 22. Inquiry into sexual matters[43]

[a] Cases alleging sexual harassment at work

In the following case, the court ruled that a female plaintiff alleging emotional trauma from sexual harassment at work is not entitled to the presence of counsel at her mental examination by the defendant's physician, merely because the doctor might improperly question the plaintiff as to her sexual history.

Declaring that a civil litigant is not entitled to the presence of counsel at his or her mental examination by an opponent's physician, absent a showing of good cause to permit such attendance, the court in Vinson v Superior Court (1987) 43 **Cal** 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301, ruled that no exception is warranted for cases involving emotional trauma allegedly resulting from sexual harassment on the job, and held proper in such a case an order requiring the plaintiff to submit to a mental examination without the presence of her attorney, despite the plaintiff's claims that counsel's presence was necessary to shield her from inappropriate interrogation as to her sexual history, and for support in an alien and hostile environment. The plaintiff pointed out that psychiatric examinations for sexual assault victims have been widely viewed as inhibiting rape prosecutions by implicitly placing the victim on trial. The plaintiff argued that a sexual harassment victim is analogous to the prosecutrix in a rape case, and noted legislative findings that discovery regarding the sexual aspects of harassment plaintiffs' lives may tend to discourage such complaints. The court, however, explained that while the state has a strong interest in eradicating the evil of sexual harassment, and although the threat of an uncounseled mental examination could dampen a plaintiff's resolve to bring suit, such plaintiffs have substantial protection under existing procedural rules. The court found it unlikely that the typical sexual harassment suit would justify a mental examination, which would ordinarily be considered only where the alleged mental or emotional distress is claimed to be ongoing. The court further reasoned that when an examination is permitted, investigation by a psychiatrist into the plaintiff's private life is severely constrained, and sanctions are available to guarantee that such restrictions are obeyed. Noting an absence of proof that the defendants' expert would not respect the plaintiff's legitimate rights to privacy, or that he might disobey any court-imposed restrictions, the court commented that the plaintiff's apprehension appeared to stem less from the reality of the proposed analysis, than from the popular image of mental examinations.

But see Zabkowicz v West Bend Co. (1984, ED Wis) 585 F Supp 635, 35 BNA FEP Cas 209, 39 FR Serv 2d 1294, later proceeding (ED Wis) 589 F Supp 780, 35 BNA FEP Cas 610, 35 CCH EPD ¶ 34766, later proceeding (ED Wis) 601 F Supp 139, 36 BNA FEP Cas 1540, 37 CCH EPD ¶ 35242, affd in part and revd in part (CA7 Wis) 789 F2d 540, 40 BNA FEP Cas 1171, 40 CCH EPD ¶ 36089, 4 FR Serv 3d 1229 (disagreed with on other grounds by multiple cases as stated in Huffman v Hains (CA7 Ind) 865 F2d 920), more fully discussed in § 17, in which the court, considering an emotional damage claim by a female employee and her husband against the wife's employer and co-workers arising out of alleged sexual harassment on the job, ruled that the plaintiffs were entitled to have legal counsel present during their mental examination by a defense psychiatrist. Without directly addressing the significance of the nature of the claim, or the anticipated scope of the doctor's inquiry, the court agreed with the plaintiffs' argument that attendance by a third party was necessary to assure that the doctor did not probe beyond "permissible limits."

[b] Other sexual abuse or assault cases—attorney excludable despite questioning by male physician

Although several female plaintiffs claiming emotional injury due to sexual abuse by the defendant doctor argued that they might be further traumatized through extensive questioning by another male physician, the court in the following case held that the plaintiffs could not have legal counsel present during their mental examination by the defendant's designated psychiatrist.

In Rochen v Huang (1988, **Del** Super) 558 A2d 1108, the court held that 4 female plaintiffs allegedly suffering from posttraumatic stress disorder due to sexual abuse inflicted on them by the defendant physician would not be allowed to have an attorney present during their mental examination by the defendant's designated psychiatrist, despite their complaint that they had already been traumatized by the incidents at issue, as well as by the legal discovery process, and that they might be further traumatized through extensive interrogation by another male physician. The court, while expressing full confidence that the plaintiffs' counsel would not interrupt the examination if so directed by the court, nevertheless found that any attorney's presence during the intense discussions involved in a psychiatric interview would be disruptive and intimidating, and could impair the defendant's ability to obtain a complete and fair mental evaluation of the plaintiffs. The court concluded that the plaintiffs' emotional state could be adequately safeguarded by allowing them to have a health care practitioner of their choice present during the examination, and that their legal interests could be protected by requiring that the interview be electronically recorded.

[c] —Attorney excludable due to sensitive nature of questioning

In the following case, the court held that the trial judge in a premises liability action properly ordered that the female plaintiff be mentally examined by the defendant's physician without the presence of the plaintiff's attorney, based on the physician's affirma-

43. For cases involving emotional distress due to circumstances other than possible inquiry into sexual matters, see § 21.

tion that the inquiry would be sensitive in nature due to the alleged injury.

Where the defendant in a premises liability action involving a rape and sodomization of the female plaintiff sought a mental examination of the plaintiff, in order to ascertain the extent of her alleged posttraumatic distress disorder, the court in Barraza v 55 West 47th Street Co. (1989, 1st Dept) 156 App Div 2d 271, 548 NYS2d 660, held that the trial judge did not abuse his discretion in ordering that the examination be conducted by the defendant's physician without the plaintiff's attorney in attendance, where the order was based on affidavits by the proposed examining physician that the inquiry would be of a sensitive nature, due to the injury alleged.

B. Presence of Examinee's Physician

§ 23. Physician's attendance allowed or generally permissible

The courts in the following cases held that civil litigants generally, or particular parties, are or were permitted to have a physician or other health care practitioner of their choice present during a mental examination by an opponent's designated physician, subject to limitations on the accompanying expert's conduct during the examination or at trial.

In Lowe v Philadelphia Newspapers, Inc. (1983, ED Pa) 101 FRD 296, 44 BNA FEP Cas 1224, 37 FR Serv 2d 1154, later proceeding (ED Pa) 594 F Supp 123, 79 ALR Fed 207, an employment discrimination action in which damages for mental injury were claimed, the court held that in the plaintiff's psychiatric examination by the defendant's chosen physician, the plaintiff could have a psychiatrist or other medical expert of her own choosing present during the examination, who would be permitted to make notes of his or her observations, but would not be allowed to advise the plaintiff during the examination.

The court in Rochen v Huang (1988, Del Super) 558 A2d 1108, ruled that in order to safeguard the emotional state of 4 female plaintiffs allegedly suffering from posttraumatic stress disorder due to sexual abuse inflicted on them by the defendant physician, the plaintiffs would be allowed to have a health care practitioner of their choice present during their mental examination by the defendant's designated psychiatrist. The court emphasized that this person, while free to observe the examination, would not be allowed to participate by way of objection or interruption.

And in Gray v Victory Memorial Hosp. (1989) 142 Misc 2d 302, 536 NYS2d 679, the court held that a personal injury plaintiff may have his or her own psychiatrist present to observe the plaintiff's mental examination by the defendant's designated physician, absent a compelling showing of why the plaintiff's doctor should not be allowed to attend the interview. Noting other cases recognizing a plaintiff's right to an attorney's or physician's presence at an adverse physical examination, the court discerned a strong predisposition to

permit the plaintiff to be accompanied to an examination. The court observed that such an examination is part of the adversarial process, and explained that to deny the plaintiff the accompaniment of his or her choice, be it an attorney or a psychiatrist sent by an attorney, is to infringe on the right to be assisted by counsel. The court concluded, however, that while the plaintiff may have his or her own psychiatrist present, that physician is not permitted to testify on the plaintiff's direct case about the procedures and methods used by the defendant's psychiatrist during the examination. On the other hand, the court said, observations by the plaintiff's psychiatrist may furnish counsel with material for cross-examination that would not otherwise be available.

Consult POCKET PART in this volume for later cases

Partnership (1990, CA2 Conn) 912 F2d 23 (applying Conn law), § 12.

Lease of commercial laundry equipment to lessee who opened and began to operate laundry business constituted "business opportunity" within meaning of Sale of Business Opportunities Act, which defined "business opportunity" as "the sale or lease of, or offer to sell or lease, any products, equipment, supplies, or services for the purpose of enabling the purchaser to start a business and in which the seller or company represents . . . [t]hat, in conjunction with any agreement which requires a total initial payment . . . exceeding $500.00, the purchaser may or will derive income from the business opportunity which exceeds the initial payment from the business opportunity . . . ," where there was evidence that, in negotiating lease, lessor's agent made such representation to lessee regarding income to be derived from operating laundry. Park Leasing Co. v TWS, Inc. (1992) 206 Ga App 864, 426 SE2d 620.

§ 7. Goods or services supplied by seller

[b] Found not to be supplied by seller

Supplier of lift trucks did not violate Maine statute regulating sale of business opportunities when entering into sales and service agreement with dealer; complaining dealer purchased ongoing dealership directly from owner, rather than supplier, while statute applied to new businesses, and dealer had not made required payment for goods needed to start new business called for under statute. 32 M.R.S.A. §§ 4691, subds. 3, 6, 4696, 4699, 4700, subd. 6. Mitsubishi Caterpillar Forklift America, Inc. v. Superior Service Associates, Inc., 81 F. Supp. 2d 101 (D. Me. 1999).

§ 12. "Seller"

In case in which plaintiff's father owned 20 McDonalds restaurants, originally intended to transfer to plaintiff all 20 restaurants plus exclusive rights to expand new reastaurants in area, but sold 18 of restaurants and exclusive rights to defendants in reliance on allegedly false statement by defendant that plaintiff would be considered for future expansion in county, defendant did not violate state business opportunity statute where plaintiff purchased remaining two franchises from father, not from defendant. Schubot v McDonalds Corp. (1990, SD Fla) 757 F Supp 1351.

In action under state business opportunity investment act by ophthalmic care corporation, which bought marketing rights to outstanding bill recovery system, against developer of system, court erred in granting summary judgment in favor of developer on grounds that it was not "seller" within meaning of act, under plain language of act, developer "engaged in business of selling" when it entered into marketing agreement with corporation disposing of all its marketing rights in Connecticut; in determining that developer was not seller because it thought agreement arose from mutually beneficial business arrangement between it and corporation, under which developer had provided recovery services for corporation, court incorrectly read in requirement that developer must have solicited corporation in order for it to have sold business opportunity; substantial evidence also existed that developer planned to start new business as result of its dealing with corporation; on remand, jury would be required to consider whether marketing plan, advertisement placed in newspaper by developer seeking sales/marketing professional for Connecticut, and oral statements allegedly made by developer's executive officers prior to execution of marketing agreement supported finding that under agreement developer contracted to supply sales or marketing program, as required by statute. Eye Assoc. P.C. v Incomrx Systems Ltd. Partnership (1990, CA2 Conn) 912 F2d 23 (applying Conn law).

Corporation that developed "video magazine" for floor covering industry by which corporation would sell monthly video to floor covering distributors, who would in turn sell subscriptions to program to retailers, was "seller" within meaning of Connecticut business opportunity investment act, and distributorship arrangement for sale constituted "sales program" or "marketing program" within Act, and corporation was therefore required to comply with requirement of Act that it register with state banking commissioner and where corporation failed to do so, it could not bring suit against defendant for tortious interference with prospective contract between it and distributor. Fineman v Armstrong World Industries, Inc. (1991, DC NJ) 774 F Supp 225, 1991-2 CCH Trade Cases ¶ 69595, supp op, motion gr (DC NJ) 774 F Supp 266, 1991-2 CCH Trade Cases ¶ 69600 (applying Conn law).

§ 15. Recision of contract—provision of notice to seller

Statutory right to rescind a transaction and recover the investment pursuant to the Sale of Business Opportunities Act (SBOA) is not available to a plaintiff who has not notified the seller of the exercise of that right within one year. O.C.G.A. § 10-1-417(a). League v. U.S. Postamatic, Inc., 235 Ga. App. 171, 508 S.E.2d 210 (1998), cert. denied, (Feb. 26, 1999).

84 ALR4th 419-454

Research References

Electronic Search Query

constru! or interpret! or valid! or invalid! or constitution! or unconstitution! or appli! w/100 resolution or provision or ordinance or statut! or law or regulation or code or act w/30 (preferen! w/5 domestic or local) or (buy american).

West Digest Key Numbers

Commerce 10, 54.

Constitutional Law 70(1), 89(1), 207(1), 210(1), 213.1(1), 213.1(2), 225, 225.4.

Mun Corporations 282(4), 330(3), 513(7).

Public Contracts 2.

Statutes 64(2), 79(2), 88.

§ 1. Introduction

[b] Related matters

Authority of state, municipality, or other governmental entity to accept late bids for public works contracts. 49 ALR5th 747.

What projects involve work subject to state statutes requiring payment of prevailing wages on public works projects. 10 ALR5th 337.

Employees' private right of action to enforce state statute requiring payment of prevailing wages on public works projects. 10 ALR5th 360.

What are "prevailing wages," or the like, for purposes of state statute requiring payment of prevailing wages on public works projects. 7 ALR5th 400.

Employers subject to state statutes requiring payment of prevailing wages on public works projects. 7 ALR5th 444.

What entities or projects are "public" for purposes of state statutes requiring payment of prevailing wages on public works projects. 5 ALR5th 470.

Who is "employee," "workman," or the like, of contractor subject to state statute requiring payment of prevailing wages on public works projects. 5 ALR5th 513.

Validity, construction, and effect of requirement under state statute or local ordinance giving local or locally qualified contractors a percentage preference in determining lowest bid. 89 ALR4th 587.

84 ALR4th 462-525

Research References

19 Am Jur Proof of Facts 3d 335, AIDS-Dementia—Incapacity to Execute Will.

17 Am Jur Proof of Facts 3d 219, Alzheimer's and Multi-Infarct Dementia—Incapacity to Execute Will.

Electronic Search Query

guardian! w/50 (ademption or adeem! or revocation or revoke) w/50 (devise or bequest) w/50 (incompetent w/10 testator or testatrix).

West Digest Key Numbers

Mental Health 273.

Wills 765, 767, 768, 770.

84 ALR4th 531-545

Research References

Electronic Search Query

(revok! or revocation or nonrevocation) w/60 codicil.

West Digest Key Numbers

Wills 195, 206, 207, 233, 290, 302(8), 306, 386, 90.

84 ALR4th 558-599

Research References

Electronic Search Query

lawyer or counsel or attorney or doctor or physician or surgeon or psychologist or psychiatrist w/10 right or entitl! w/10 physical or mental or psycholog! or psychiatr! or health w/2 test! or screen! or exam!.

West Digest Key Numbers

Damages 206(1), 206(5), 206(6), 206(7), 206(8).

Federal Civil Procedure 1651.

Pretrial Procedure 455.

New sections and subsections added:

§ 24. Physician's attendance not allowed

§ 1. Introduction

[b] Related matters

Right of convicted defendant or prosecution to receive updated presentence report at sentencing proceedings. 22 ALR5th 660.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence. 12 ALR5th 577.

§ 3. View that examinee ordinarily may have attorney present

Also holding or recognizing that civil liti-

gant subjected to physical examination at opponent's instance, and to be conducted by doctor designated by opponent, ordinarily has right to have attorney present during examination:

NY—Grady v Phillips (1993, Sup) 159 Misc 2d 848, 606 NYS2d 877.

Plaintiff had right to have his attorney present during independent medical examination of plaintiff requested by defendant, considering Pennsylvania civil procedure rule permitting attorneys to be present at examinations. Fed.Rules Civ.Proc.Rule 35(a), 28 U.S.C.A.; Pa.Rules Civ.Proc., Rule 4010(a)(4)(i), 42 Pa.C.S.A. Gensbauer v. May Dept. Stores Co., 184 F.R.D. 552 (**E.D. Pa.** 1999).

See McCorkle v Fast (1992, **Fla App D2**) 599 So 2d 277, 17 FLW D 1368, § 4.

§ 4. —But court may bar attorney if opponent establishes need for exclusion

Trial court erred in prohibiting plaintiffs' attorney from attending orthopedic examination that had been scheduled by defendant, despite fact that designated doctor refused to perform examination under such conditions. Absent any valid reason to exclude counsel or other representative, their presence should be allowed, and doctor's objections, standing alone, were insufficient since he had not been shown to be uniquely qualified to perform examination or otherwise essential to preparation of defendant's case. Although defendant's counsel stated he was unable to locate another examiner willing to accept attendance by third parties, plaintiffs disputed this assertion and contended that substitutes were available in same locality. McCorkle v Fast (1992, **Fla App D2**) 599 So 2d 277, 17 FLW D 1368.

Plaintiff has the right to have his counsel, a court reporter, or both present at compelled independent medical examination, unless a valid, case-specific reason is given by the examining doctor why such would be unreasonably disruptive, and evidence is presented further that no other medical specialist is available who will conduct the examination under those circumstances. West's F.S.A. RCP Rule 1.360(a), Lunceford v. Florida Cent. R. Co., Inc., 728 So. 2d 1239 (**Fla. Dist. Ct. App. 5th Dist.** 1999).

§ 6. View that examinee generally has no right to presence of attorney

Also holding or recognizing that civil litigant, subjected to physical examination at opponent's instance by physician opponent had designated, generally has no right to presence of his or her attorney during examination:

W Va—State ex rel. Hess v Henry (1990, W Va) 393 SE2d 666.

Absent some compelling showing of need, district court would not allow attorney who was representing personal injury claimant to attend mental and psychiatric examinations of claimant, in order to avoid converting what were intended to be medical examinations into adversary proceedings. Fed.Rules Civ.Proc.Rule 35, 28 U.S.C.A. McKitis v. Defazio, 187 F.R.D. 225 (**D. Md.** 1999).

Counsel for patient who sued government for medical malpractice was not entitled to be present during patient's physical examination by government's expert witness. Fed. Rules Civ. Proc. Rule 35(a), 28 U.S.C.A. Holland v. U.S., 182 F.R.D. 493 (**D.S.C.** 1998).

§ 8. View that attorney's presence during examination is a matter within court's discretion

Also recognizing that it is within trial judge's sound discretion whether plaintiff should be compelled to submit to examination without attendance of attorney:

Tex—Simmons v Thompson (1995, Tex App Texarkana) 900 SW2d 403; Simmons v Thompson (1995, Tex App Texarkana) 900 SW2d 403.

§ 11. View that examinee ordinarily may have physician present

Also recognizing that ordinarily, party in civil action may have his or her own physician present during physical examination of party by opponent's doctor or medical expert:

US—Bennett v White Lab. (1993, MD Fla) 841 F Supp 1155.

§ 14. View that examinee not entitled to physician's presence

Also holding or recognizing that civil litigant, subjected to physical examination at opponent's instance by physician opponent had designated, generally has no right to presence of his or her own doctor during examination:

W Va—State ex rel. Hess v Henry (1990, W Va) 393 SE2d 666.

§ 18. View that examinee generally has no right to presence of attorney

Plaintiff did not carry burden of establishing special needs to support her request that her attorney be present during court-ordered mental examination, based on the fact that she did not have an expert witness; moreover, allowing plaintiff's attorney to be present would only increase the likelihood of creating an adversarial atmosphere. Fed.Rules Civ.Proc.Rule 35(a), 28 U.S.C.A. Bethel v. Dixie Homecrafters, Inc., 192 F.R.D. 320, 82 Fair Empl. Prac. Cas. (BNA) 345, 77 Empl. Prac. Dec. (CCH) ¶ 46303 (**N.D. Ga.** 2000).

§ 19. —But court may admit attorney if examinee shows good cause for counsel's presence

Court would not exercise its discretionary authority under discovery rule to permit plaintiff's attorney or a legal assistant or paralegal to be present at her court-ordered examination by defendant's psychiatrist, absent evidence that examiner would engage in any impropriety. Fed.Rules Civ.Proc.Rules 26(c), 35(a), 28 U.S.C.A. Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 80 Fair Empl. Prac. Cas. (BNA) 355 (**D. Kan.** 1999).

In absence of good cause, party undergoing mental examination requested by other party is not permitted to have attorney present during examination. Stoughton v B.P.O.E. #2151 (1995, App Div) 281 **NJ Super** 605, 658 A2d 1335.

§ 24. [New] Physician's attendance not allowed

Court would not exercise its discretionary authority under discovery rule to permit plaintiff's treating physician to be present at court-ordered examination of plaintiff by defendant's psychiatrist, absent evidence that examiner would improperly question plaintiff or use harmful techniques in the examination. Fed.Rules Civ.Proc.Rules 26(c), 35(a), 28 U.S.C.A. Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 80 Fair Empl. Prac. Cas. (BNA) 355 (**D. Kan.** 1999).

84 ALR4th 620-625

Research References

Electronic Search Query

forfeit! w/100 (controlled w/3 substance or cocaine or marij! or cannabis| heroin or drugs or narcotics or contraband) and (statut! or act or code or provision!) and (property w/2 community) or (property w/3 marital) or (tenancy w/3 entirety) or marital estate or husband or wife or spouse.

West Digest Key Numbers

Drugs and Narcotics 191, 192, 193.

Forfeitures 3, 4, 6.

Husband and Wife 14.2(5).

Attention is directed to the following cases or annotations decided after the original publication of this annotation.

In proceeding seeking forfeiture of property containing pharmacy, which was owned by pharmacist and his wife as tenancy by entireties but had been used by pharmacist, without wife's knowledge, for illegal diversion of pharmaceutical drugs, wife's innocent-owner defense under 21 U.S.C.A. § 881(a)(7) did not bar government from forfeiting husband's interest in property. District court was required to determine whether husband's interest was subject to forfeiture irrespective of wife's innocent-owner defense. If court decided accordingly, it was then required to enter order forfeiting that interest but preserving wife's right to full and exclusive use and possession of property during her life, her protection against conveyance of or execution by third parties on her husband's former interest, and her survivorship right. United States v Parcel of Real Property Known as 1500 Lincoln Ave. (1991, **CA3 Pa**) 949 F2d 73.

Absent consent from both spouses, entireties property may properly be the subject of a criminal forfeiture only when both spouses acting together are guilty of some criminal misconduct. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 413, as amended, 21 U.S.C.A. § 853; Fed.Rules Cr.Proc.Rule 41(e), 18 U.S.C.A. Christunas v. U.S., 61 F. Supp. 2d 642 (**E.D. Mich.** 1999).

Wife of defendant convicted of narcotics offense sustained her burden of proving that she was innocent owner who neither had knowledge of nor consented to her husband's illicit use of their jointly owned real estate to facilitate his commission of narcotics trafficking offenses; hence, property was not subject to forfeiture. Inter alia, wife had told defendant that she would divorce him if he continued to engage in drug dealing; drug deals almost never took place at house, and one deal that was conducted on premises was conducted in garage and out of wife's presence; and wife denied having any knowledge of defendant's drug activities during time period relevant to his conviction. United States v 44133 Duchess Drive (1994, **ED Mich**) 863 F Supp 492 (applying Mich law).

Under "innocent owner" provision of Controlled Substances Forfeiture Act, pickup truck that was used by husband to transport quantity of cocaine could not be forfeited where truck was owned by husband and wife as tenants by entirety and where wife established that husband's drug activities were committed without her knowledge or consent. Commonwealth v One 1988 Toyota Truck (1991, **Pa Cmwlth**) 596 A2d 1230.

U.S. Security Insurance Co. v. Cimino, No. SC93932 (Fla. 03/09/2000)

[1] Supreme Court of Florida

[2] No. SC93932

[3] 2000.FL.0043550 <http://www.versuslaw.com>

[4] March 9, 2000

[5] **U.S. SECURITY INSURANCE COMPANY A/K/A U.S. SECURITY INSURANCE COMPANY, INC., PETITIONER,**
V.
JEANNI M. CIMINO, RESPONDENT.

[6] Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions First District - Case No. 1D97-4373 (Leon County)

[7] David B. Pakula of Fazio, Dawson, DiSalvo, Cannon, Abers, Podrecca & Fazio, Fort Lauderdale, Florida, for Petitioner Tari Rossitto-Van Winkle, Tallahassee, Florida, for Respondent

[8] The opinion of the court was delivered by: Quince, J.

[9] We have for review Cimino v. U.S. Security Insurance Co., 715 So. 2d 1092 (Fla. 1st DCA 1998), wherein the district court certified conflict with Klipper v. Government Employees Insurance Co., 571 So. 2d 26 (Fla. 2d DCA 1990). We have jurisdiction. See Art. V, § 3(b)(3), Fla. Const. We approve the First District's decision in Cimino, because we find that absent a valid reason for denial, an insured is entitled to have an attorney or videographer present at a physical examination. We disapprove the opinion in the conflicting case of Klipper.

[10] Jeanni M. Cimino (Cimino) was injured in an automobile accident and sought benefits pursuant to her personal injury protection (PIP) automobile insurance policy with U.S. Security Insurance Company (Security). Security scheduled a medical examination for Cimino. Pursuant to section 627.736(7), Florida Statutes (1997), and as provided for in a provision in the insurance policy, Security chose the physician. Cimino responded with a request that her attorney be present to videotape the examination with a small, hand-held video camera. Cimino and her attorney reported for the September 2, 1997, examination; however, the physician refused to perform the examination. The physician stated she had

been instructed by Security that the attorney could not be present and the examination could not be videotaped. *fn1 Security rescheduled the examination for September 30, 1997, but warned Cimino that her attorney would not be allowed to attend. Security also advised Cimino that failure to attend the scheduled examination or failure to comply with the required conditions would result in termination of her benefits.

[11] Cimino filed an action for declaratory judgment, seeking to have the trial court determine her rights under the insurance policy and under section 627.736. She also filed a motion for a temporary injunction. On September 29, 1997, an emergency hearing was held, via telephone, on the motion for temporary injunction. The trial court granted the injunction pursuant to a stipulation and with the understanding that the matter would be reconsidered when the parties had sufficient time to prepare. The temporary injunction relieved Cimino of her obligation to attend the rescheduled examination and prohibited Security from terminating benefits or scheduling any further examinations unless Cimino's counsel was allowed to attend and videotape the examination.

[12] Security moved to dissolve the injunction. At a hearing on that motion, Security's primary argument was that the temporary injunction was improperly granted because Cimino had not demonstrated that she would likely prevail on the merits. See City of Jacksonville v. Naegele Outdoor Adver. Co., 634 So. 2d 750 (Fla. 1st DCA 1994). Relying upon Klipper v. Government Employees Insurance Co., 571 So. 2d 26 (Fla. 2d DCA 1990), where the district court found the insured was not entitled to have a court reporter present during a medical examination conducted pursuant to section 627.736, the trial court ordered the temporary injunction dissolved. Cimino appealed. The First District Court of Appeal reversed the trial court's decision and certified conflict with Klipper. See Cimino v. ***U.S. Security Ins. Co.***, 715 So. 2d at 1094.

[13] The First District was correct in its finding that Cimino's attorney could be present at her PIP independent medical examination. The presence of an attorney during a medical examination is an issue of first impression that has not be ruled on by this Court. However, the presence of an attorney and other third parties at medical examinations has been addressed in a number of cases in the district courts, at least in the context of Florida Rule of Civil Procedure 1.360 *fn2 and workers' compensation examinations. *fn3

[14] As the First District pointed out, the issue of who may be present during medical examinations first arose in the context of examinations pursuant to rule 1.360. See Touchet v. Big Bend Moving & Storage, Inc., 581 So. 2d 952 (Fla. 1st DCA 1991)(holding the trial court departed from the essential requirements of the law by prohibiting plaintiff's counsel from attending a rule 1.360 examination); Stakley v. Allstate Insurance Co., 547 So. 2d 275 (Fla. 2d DCA 1989)(holding absent a valid reason for denial, a person being examined pursuant to rule 1.360 can have a third party present); Bartell v. McCarrick, 498 So. 2d 1378 (Fla. 4th DCA 1986)(holding burden is on the party opposing the presence of a third person at a compulsory medical examination to show why presence should be denied). The Second District additionally found in Broyles v. Reilly, 695 So. 2d 832 (Fla. 2d DCA 1997), that the person being examined could have a videographer present during an examination pursuant to rule 1.360. See also Wilkins v. Palumbo, 617 So. 2d 850 (Fla. 2d DCA 1993); Collins v.

Skinner, 576 So. 2d 1377 (Fla. 2d DCA 1991)(both holding a plaintiff in a personal injury suit is entitled to have a court reporter present during a compulsory medical examination). The presence of a third party has also been litigated in the workers' compensation context. See McClennan v. American Building Maintenance, 648 So. 2d 1214 (Fla. 1st DCA 1995)(finding that an employer/carrier would have to demonstrate a valid reason to exclude a claimant's attorney from a workers' compensation examination).

[15] On the other hand, there has been little litigation on the issue of third-party attendance at a medical examination conducted pursuant to the terms of the insured's contract with the insurer and section 627.736, Florida Statutes. See Cimino; Klipper. The examination requirements contained within section 627.736(7)(a)-(b), Florida Statutes (1997), are, in pertinent part, as follows:

[16] (a) Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection insurance benefits, such person shall, upon the request of an insurer, submit to mental or physical examination by a physician or physicians. The costs of any examinations requested by an insurer shall be borne entirely by the insurer. Such examination shall be conducted within the municipality of residence of the insured or in the municipality where the insured is receiving treatment. If the examination is to be conducted within the municipality of residence of the insured and if there is no qualified physician to conduct the examination within such municipality, then such examination shall be conducted in an area of the closest proximity to the insured's residence. Personal protection insurers are authorized to include reasonable provisions in personal injury protection insurance policies for mental and physical examination of those claiming personal injury protection insurance benefits. An insurer may not withdraw payment of a treating physician without the consent of the injured person covered by the personal injury protection, unless the insurer first obtains a report by a physician licensed under the same chapter as the treating physician whose treatment authorization is sought to be withdrawn, stating that treatment was not reasonable, related, or necessary.

[17] (b) . . . If a person unreasonably refuses to submit to an examination, the personal injury protection carrier is no longer liable for subsequent personal injury protection benefits.

[18] The "Conditions" section of Cimino's insurance policy reads:

[19] [The insured] shall submit to mental and physical examinations at the Company's expense when and as often as the Company may reasonably require. A copy of the medical report shall be forwarded to such person if requested. If the person unreasonably refuses to submit to an examination the Company will not be liable for subsequent personal injury protection benefits.

[20] Additionally, the "Duties After an Accident of Loss" section provides:

[21] A person seeking any coverage or benefit must:

[22] 1. Cooperate with us in the investigation, evaluation, settlement of defense of any first party or third party claim or suit. Cooperation includes but is not limited to providing oral, sworn or written statements and submitting, to physical examinations by physicians selected by the company.

[23] The combined effect of the statute and the policy is to allow Security to require Cimino to attend a PIP examination in order to continue receiving her benefits.

[24] In Klipper, the Second District was asked to decide whether a court reporter could be present at such a PIP examination. The Second District declined to draw a parallel between a PIP examination and a rule 1.360 examination. The court reasoned that a rule 1.360 examination presupposes that litigation has been initiated and that the parties are "in an adversarial posture." Klipper, 571 So. 2d at 27. The court went on to say this type of examination, provided for under the statute and which arose from the contract of insurance, is conducted to assist the insurer in evaluating the claim made by the insured. Therefore, the court opined PIP examinations were distinguishable from rule 1.360 examinations. See id.

[25] Conversely, in Cimino, the First District relied upon rule 1.360 and workers' compensation examination cases to support the insured's right to have an attorney present at a PIP examination. Citing Toucet v. Big Bend Moving & Storage, 581 So. 2d at 953, the court reasoned the adversarial nature of a rule 1.360 examination was a compelling reason to permit counsel to be present. See Cimino, 715 So. 2d at 1093. The court noted that the same rationale had been applied in the workers' compensation context. See id. Unable to distinguish a PIP examination from a rule 1.360 or workers' compensation examination, as the Second District had done in Klipper, the First District held an insured had a right to have an attorney present during a required PIP examination. In so holding the court said:

[26] With reference to the first quoted paragraph from Klipper, in Adelman Steel Corp. v. Winter, 610 So. 2d 494 (Fla. 1st DCA 1992), we explained, "When resort to an [independent medical examination] is necessary by either party, the parties' relationship is clearly adversarial, and a physician performing an IME should be treated as the requesting party's expert witness . . . ." Id. at 505. We recently reaffirmed this position in Reed v. Reed, 643 So. 2d 1180 (Fla. 1st DCA 1994). Id. at 1094. The First District also certified conflict with Klipper.

[27] The questions underlying the certified conflict between Cimino and Klipper are whether a PIP examination is adversarial in nature, making it analogous to rule 1.360 and workers' compensation examinations, and whether the contract of insurance precludes the insured from making the attendance of a third party a condition of the examination. See Cimino, 715 So. 2d at 1094 (reasoning that when a PIP examination is necessary, the relationship is clearly adversarial and finding the presence of a third party not precluded under the statute or contract). But see Klipper, 571 So. 2d at 27 (reasoning a PIP examination is not necessarily detrimental or merely a prelude to litigation and holding the insured is not entitled under

statute or contract to set additional conditions).

[28] Security argues a PIP examination is non-adversarial in nature. It submits that a PIP examination's main purpose is to assist the insurer in determining whether treatment should continue. See Tindall v. Allstate Ins. Co., 472 So. 2d 1291 (Fla. 2d DCA 1985). Conversely, Cimino argues a PIP examination is entirely adversarial in nature because it only comes about when an insurance company is trying to terminate or at the very least is questioning the continuation of an insured's benefits, and the presence of an attorney will level the playing field.

[29] It is well established that Florida follows a liberal view when determining whether attorneys may attend examinations. *fn4 See Bartell v. McCarrick, 498 So. 2d 1378 (Fla. 4th DCA 1986). As a result, the First District concluded the burden should fall on the insurer to exclude an observer. See Broyles v. Reilly, 695 So. 2d 832, 834 (Fla. 2d DCA 1997). *fn5 We agree with this approach. Given Florida's liberal posture with regard to rule 1.360 and workers' compensation examinations, there is no valid reason to require the trial court to apply a different standard for PIP examinations. A PIP examination is a potential step in the direction of litigation. The insured is claiming an entitlement to continued benefits and the insurer is questioning the necessity for same. In order to continue receiving benefits the insured must comply with the requirements of the insurance contract and section 627.736. The insured is required to comply with a PIP examination in order to continue to receive the contractual benefits. The insured and the insurer are certainly not in agreement at this point. Because the potential is there for an adversarial contest, the insured should be afforded the same protections as are afforded to plaintiffs for rule 1.360 and workers' compensation examinations.

[30] We are persuaded by the fact that the doctor conducting the examination will provide a report to the insurance company, which will be the basis of the insurance company choosing to either continue or discontinue benefits. In cases where benefits are terminated based upon the doctor's recommendation and the insured contests the termination, the report, including statements made by the insured to the doctor during the examination, and potentially the doctor's own live testimony about the examination, may be used against the insured. Therefore, it is unfair to place insureds in a position where anything they say may be used to terminate their benefits, but they are not allowed an opportunity to protect themselves. As the court said in Sharff v. Superior Court, 282 P.2d 896 (Cal. 1955):

[31] 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. The plaintiff, therefore, should be permitted to have the assistance and protection of an attorney during the examination. See Williams v. Chattanooga Iron Works, 1915, 5 Tenn. Civ. App. 10, 20-21, affirmed 131 Tenn. 683, 176 S.W. 1031. 282 P.2d at 897.

[32] Of course, the attorney's presence during the examination is premised upon a requirement that the attorney not interfere with the doctor's examination.

[33] Security argues that such a decision will make it impossible for insurance companies to find doctors who are willing to perform PIP examinations. However, we find this argument unconvincing in light of the fact that there have been no such problems with rule 1.360 or workers' compensation examinations. See Bartell v. McCarrick (finding an examinee has a right to have a representative present at an examination). Moreover, we are further convinced that any chilling effect on doctors is far outweighed by the positive effects of this decision. The Third District correctly noted "the potential for fraud at the confluence of the medical, legal and insurance industries is virtually unlimited." ***U.S. Security Ins. Co.*** v. Silva, 693 So. 2d 593, 596 (Fla. 3d DCA 1997). However, by allowing the examination to be observed by a third party or videotaped, the potential for harm to either party is reduced, not increased. As the Second District noted when discussing a rule 1.360 examination in Wilkins v. Palumbo, 617 So. 2d at 852:

[34] There is nothing inherently good or bad about the credibility function of an IME. If there is no court reporter or other third party present at the examination, however, a disagreement can arise between the plaintiff and the doctor concerning the events at the IME. Plaintiffs' attorneys are understandably uncomfortable with a swearing contest at trial between an unsophisticated plaintiff and a highly trained professional with years of courtroom experience. They have searched for ways to level the playing field on the credibility issues arising from such examinations.

[35] The same considerations are applicable to a medical examination required by the insured to continue PIP benefits.

[36] The concerns of physicians for conducting examinations without the distraction of third persons cannot outweigh the insured's rights. As the Fourth District noted in Bartell v. McCarrick:

[37] As this court said in Gibson v. Gibson, 456 So. 2d 1320, 1321 (Fla. 4th DCA 1984), a case in which we held that the presence of a court reporter should have been allowed at a psychiatric examination: "It is important to note also, that it is the privacy of the petitioner that is involved, not that of the examiner, and if the petitioner wants to be certain that this compelled, although admittedly reasonable, intrusion into her privacy be accurately preserved, then she should be so entitled." 498 So. 2d at 1379. Cimino's rights must prevail over the concerns of the examining physician.

[38] Secondly, Security argues that under the terms of the insurance contract the insured cannot set additional conditions for the taking of the examination. On the other hand, Cimino argues there is nothing in the insurance contract or the statute which prevents her from having her attorney present. Cimino's argument is persuasive. The language of the contract at issue here and section 627.736 contemplate a situation, such as this one, where the insured "reasonably refuses to submit" to an examination. By using the term "unreasonably refuses to submit" in both the conditions section of the policy and subsection 627.736(b), it is logical to deduce

there are scenarios where the insured "reasonably refuses to submit" to the examination. In a situation where the insured wants an attorney or other third party present at the examination, the burden is on the party opposing the third party's presence to prove that the presence is unreasonable.

[39] For these reasons, the First District's opinion in Cimino v. U.S. Security Insurance Co. is approved, and the opinion in Klipper v. Government Employees Insurance Co. is disapproved.

[40] It is so ordered.

[41] HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE and LEWIS, JJ., concur.

Opinion Footnotes

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[42] *fn1 This fact is fervently disputed by Security. They claim it was the IME physician, without direction from Security, who refused to perform the examination in the presence of the attorney and video camera.

[43] *fn2 Florida Rule of Civil Procedure 1.360(a) provides the discovery mechanism by which a party may request that another party submit to an examination when the condition that is the subject of the requested examination is in controversy.

[44] *fn3 Section 440.25(7), Florida Statutes (1997), provides: (7) An injured employee claiming or entitled to compensation shall submit to such physical examination by a certified expert medical advisor approved by the division or the judge of compensation claims as the division or the judge of compensation claims may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation shall be payable for any period during which the employee may refuse to submit to examination.

[45] *fn4 In the context of a rule 1.360 examination, or similar procedure, a survey of the states reveals three distinct approaches to third-party attendance. First, some states have found an absolute right to have an observer present during an examination. See Acosta v. Tenneco Oil Co., 913 F.2d 205 (5th Cir. 1990); Langfeldt-Haaland v. Saupe Enters., Inc., 768 P.2d 1144 (Alaska 1989); Tietjen v. Department of Labor & Indus., 534 P.2d 151 (Wash. Ct. App. 1975). The second approach holds that there is no presumptive right to have counsel present at an exam. See McDaniel v. Toledo, Peoria & Western R.R., 97 F.R.D. 525 (C.D. Ill. 1983);

Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (D. Md. 1960). Finally, the third approach grants discretion to the trial court to examine the facts and make a ruling on a case by case basis. See Hayes v. District Court, 854 P.2d 1240 (Colo. 1993); Wood v. Chicago, Milwaukee, St. Paul & Pac. R.R., 353 N.W. 2d 195 (Minn. Ct. App. 1984).

[46] *fn5 As explained in Wilkins, a physician must provide a case- specific reason why an attorney's attendance would disrupt the examination. This reason must be submitted in an affidavit. Then, the insurer must prove, at an evidentiary hearing conducted by the trial court, that no other qualified physician in the area would be willing to perform the exam with the third party present. See Wilkins v. Palumbo, 617 So. 2d 580, 854 (Fla. 2d DCA 1993); see also Broyles, 695 So. 2d at 834.

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and e-mail note to Mic Alexander, cc: Gilma Henthorne

Re: ORCP 44/55 draft for publication

ear Mic:

pon reading Gilma's clean draft of "version three", passed for publication at the September ouncil meeting, I realized for the first time that I have made a potentially serious mistake regarding carrying forward the remains of pre-existing rule 44. The problem is that I have been indicating on all recent drafts (and of course Gilma has shown in the proposal for publication) that we are deleting former ORCP 44D. The result of that would be to eliminate any means of forcing a physician to make the report contemplated in ORCP 44B.

This was never intended as a result of the changes discussed in the subcommittee or in the whole Council. Probably because time did not allow full review of the proposals, and everyone had to take my word for what they did, no one noticed this obvious error in the Council meetings.

It is entirely my fault for including section D in the items I listed as deleted in my last several drafts of these changes. I have found where that error probably got started, in the time period of November 1998 to October, 1999. An earlier draft treated the new sections of ORCP 44 as replacing section D instead of C. When we figured out it should be C we were replacing, we assumed that meant D was expendable. In recognition of the potential unintended effect of this, I made a drafter's note to myself in a version early this year as follows: "We will need to reconsider the question whether some parts of D still need to be separately stated, before finalizing our recommendations." However, I am quite sure the subcommittee never returned to this question. It was only when Gilma placed all of the new material in clear juxtaposition with the old that I realized an important provision had been placed in the scrap heap and not supplanted by any part of the new rule.

I guess my preference would be to figure out how to publish the "version three" proposal voted out by the Council without deleting ORCP 44D, calling attention to the Council members of my error and the unintended effect it would have, and running some risk that either by generating opposition from our constituents, or by upsetting Council members, this will reduce chances for its final passage.

Ideally, the solution would be to return all of section D to the rule before publishing it. It's deletion was not mentioned during Council discussion on these changes, and I am sure no one believed we were consciously deleting it. However, because part C is no longer about the same subject as before, the references in D(1) to "sections B or C" and in D(2) to "sections B and C" should be changed to say "Section B". These corrections have not been before the Council, except to the extent there is inherent authority to correct typographical or other obvious mistakes during the preparation of the proposed changes for publication. The only other choice is to give up this project for the current biennium, which I am also prepared to live with.

FAX and e-mail note to Mic Alexander, cc: Gilma Henthorne

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I haven't tried to poll subcommittee or Council members about this, but that may be doable, depending on Gilma's deadline for publication.
I have a CLE at the bar office at 4:00 pm today, and will be in most of tomorrow.

Sorry about this. Bill Gaylord